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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-639

CITY OF HARTFORD, on behalf of itself and its inhabitants, Miriam Jordan and Fannie Mauldin,

Petitioners,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of *certiorari* issue to review the ruling of the United States Court of Appeals for the Second Circuit, *en banc*, which reversed the decision of the District Court and dismissed this action.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, on rehearing *en banc*, which reversed the decision of the District Court and dismissed petitioners' action, is appended at A 1. The opinion of the three judge panel of

the Court of Appeals for the Second Circuit, is appended at A 26. The opinion of the United States District Court for the District of Connecticut, reported at 408 F. Supp. 889, is appended at A 61.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit, on rehearing *en banc,* was rendered on August 15, 1977. This petition is filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals in ruling that petitioners lacked standing to sue properly interpreted the requirements of *Warth* v. *Seldin* and *Simon* v. *Eastern Kentucky Welfare Rights Organization.*

2. Whether *Warth* and *Simon* require or allow a lower court to question the appropriateness of a congressionally mandated remedy for purposes of determining standing.

Statutes Involved

The Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301, *et seq.,* and the Administrative Procedure Act, 5 U.S.C. § 702.

Statement of the Case

This case comes before this Court from a sharply divided Court of Appeals for the Second Circuit, sitting *en banc,* which held in a six to four ruling that the petitioners lack standing to maintain this action. The dis-

agreement below turned on the proper interpretation of recent decisions by this Court on standing to sue. More particularly, the majority below read *Warth* v. *Seldin,* 422 U.S. 490 (1975), and *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976) to require the complainants to show a virtual certainty of substantial and specific benefits flowing to them from undertaking this litigation. The dissenters maintain that the majority's interpretation of *Warth* and *Simon* establishes a burden impossible of satisfaction, and gives "the Executive a silent veto [over congressional actions] not provided in the Constitution" (A 25). The conflict below followed on the heels of a similar confrontation in the Second Circuit where the Court also split six to four in an *en banc* ruling involving the issue of standing to contest an alleged Department of Housing and Urban Development (HUD) violation of Federal Civil Rights laws. *Evans* v. *Lynn,* 537 F.2d 571 (2nd Cir. 1976), *cert. den.* —— U.S. —— (1977).

This action was commenced on August 11, 1975. The petitioners challenged a decision by HUD approving federal community development grants to seven Hartford suburbs. The petitioners' primary claim was that there had been a lack of compliance with the requirements of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.,* in that the suburban communities had presented inadequate commitments for lower cost housing in their applications for funding.

A major goal of the 1974 Act was to expand housing opportunities for lower income persons in metropolitan areas. To accomplish this purpose, recipients of community development funds under Title I of the legislation are required to include as part of their funding application a housing assistance plan (HAP). The HAP is to contain an accurate survey of the condition of the housing stock in the applicant community and an assessment of the housing assistance needs of lower income persons,

including those "residing in or expected to reside in the community." The expected-to-reside (ETR) figure refers to lower income persons and families not currently living in the community but who would wish to do so because of employment or other opportunities. Nonetheless, six of seven challenged applications submitted by the defendant suburbs contained zero ETR figures.

The filing of applications with zero ETR figures occurred as a result of a May 21, 1975 memorandum issued by Assistant Secretary Meeker of HUD's Office of Planning and Development. The Meeker Memorandum advised that applicant communities would be given the option during the first program year of not completing the ETR table of the HAP. Only East Hartford, which had filed its application with HUD prior to the Meeker Memorandum, completed its ETR table. The East Hartford ETR figure was ultimately found to be wholly inadequate by the trial court.

When the complaint was initially filed, only HUD was named as a defendant. On August 26, 1975, however, the District Court granted motions by HUD and the seven towns to join the towns as defendants.

Simultaneously with the filing of the complaint, petitioners moved for a preliminary injunction restraining HUD from disbursing any monies under the challenged grants. A consolidated preliminary injunction hearing and trial on the merits was held, and on September 20, 1975 the District Court granted the preliminary injunction. On January 28, 1976, the District Court rendered its final decision making permanent the injunction.

The District Court held that HUD violated the 1974 Act with respect to six of the seven towns by approving grants notwithstanding the fact that the applications failed "to make any assessment whatsoever of the housing needs of low and moderate income persons who might be 'ex-

pected to reside' within their borders" (A 84). The Court held that the assessment of the expected-to-reside figure was a required and non-waivable aspect of the HAP portion of the application for community development funds (A 84). With respect to East Hartford's application, the lower court found that the submitted ETR figure was legally deficient, having been based exclusively on the town's waiting list for public housing units. The District Court stated that HUD was duty bound to do more than accept any ETR figure proposed by East Hartford, "however inadequate its size or derivation. The administrative record discloses that it did not live up to that duty" (A 94).

The injunction entered barred the suburban towns from drawing funds from the Treasury under the challenged grants. The District Court provided, however, that the communities could resubmit their grant applications to HUD and that the injunction would be lifted for any town which filed an acceptable revised HAP (A 95).

Three of the suburban towns, East Hartford, West Hartford and Glastonbury, filed appeals. HUD elected not to appeal, but did file a brief *amicus curiae* with the Court of Appeals.

Shortly after the District Court ruling, HUD amended its regulations for post-1975 community development grants by establishing detailed requirements for completion of the ETR table. 24 CFR § 570.303(c)(2)(i), and (ii)(1976). In its brief to the Second Circuit, HUD stated, "The Secretary has not appealed in this case because the *result* reached by the district court is not inconsistent with the present practices adopted by HUD subsequent to the administrative determinations challenged in this litigation and because the court's opinion can be read in a manner consistent with the Department's interpretation of its duties under the Act." HUD Brief, *Amicus Curiae*, July 1976, p. 3.

On December 23, 1976, a panel of the Second Circuit affirmed the District Court ruling. The majority of that panel held that the petitioners had standing to maintain the action and, on the substantive issue, that the District Court had correctly interpreted the terms and requirements of the 1974 law. Judge Meskill filed a dissenting opinion. On February 8, 1977, the Court of Appeals granted the respondents' petitions for rehearing *en banc*.

On August 15, 1977, the full court issued its opinion. The majority of the Court disagreed with the panel's holding and reversed the District Court decision exclusively on the issue of standing to sue. Judge Meskill wrote the plurality opinion, and Chief Judge Kaufman wrote a separate concurring decision. Four members of the Court dissented with Judge Oakes writing the dissenting opinion.

The majority of the Court of Appeals concluded that the lack of compliance with the Act did not affect petitioners as it was speculative whether the injunction entered would redress their alleged injury (A 8). Judge Meskill contended that the petitioners were not harmed by the absence of an ETR figure in the community development applications, asserting that the figure represented merely "an educated guess at the number of people who are going to move into the community" (A 4). In addition, Judge Meskill argued that since fiscal 1975 housing subsidies were already being fully utilized, the lack of expected to reside figures could not affect the interest of the plaintiffs (A 8).

The majority also rejected the petitioners' claim to a financial interest in the outcome of the litigation. The District Court, had held that Hartford had a financial interest in the outcome of this case, noting that under HUD regulations if the suburban towns refused to comply with the provisions of the Act and the terms of the injunction, their grant monies would be reallocated with first priority

going to the Hartford metropolitan area. The trial court emphasized that Hartford would have a strong statutory preference to such funds. However, Judge Meskill termed this financial interest claim inadequate to support standing in the absence of proof of a "substantial probability" that the towns would in fact elect to forfeit their grants rather than modify their applications (A 9).

Judge Oakes in his dissenting opinion took strong exception to the manner in which the majority analyzed the petitioners' interest in this case. He stated that the, "Majority fails to examine the suit's principal purpose, and, as a result, misunderstands the nature of the plaintiffs' interest" (A 15). Judge Oakes noted that the petitioners' objective was not to halt the flow of community development funds to the seven suburban defendants, but rather to secure compliance by HUD with the terms and provisions of the congressional statute which HUD "was charged with enforcing for the benefit of cities like Hartford" (A 16).

Judge Oakes emphasized that HUD had, in fact, deviated, as the District Court had found, from the requirements of the 1974 statute and pointed to the fact that HUD had revised its ETR regulations for post-1975 grants in accordance with the District Court ruling. Judge Oakes stated:

> In short, I believe that Hartford stood to benefit from this suit both by forcing a change in overall HUD policy—a benefit that has been realized—and by forcing its suburbs to assist with the HCDA's spacial deconcentration objective in return for the receipt of community development funds—a benefit that, to the extent ETRs had been revised upward in the resubmitted applications, also has been realized (A 21-22).

Finally, the dissenters disagreed with the majority's contention that because the injunction permitted the respond-

ent communities to obtain their community development monies upon submission of revised applications, Hartford's claim to a financial stake in the case was negated (A 23-24).

On October 5, 1977, the Second Circuit, *en banc*, granted the petitioners' motion pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and stayed issuance of its mandate to the District Court pending the filing of this petition.

Reasons for Granting the Writ

I. The decision below indicates that there are sharply divided views among the federal judges as to the proper criteria to be applied in determining standing to sue. Review should be granted in order to clarify the standards for ascertaining standing to sue and in order to give necessary guidance to the lower courts.

The Second Circuit in holding the petitioners lacked standing to sue interpreted *Warth* and *Simon* as requiring a conclusive showing by petitioners that the remedy they sought would provide them specific and tangible benefits. The majority then asserted it was speculative whether the relief requested and obtained would in fact redress the petitioners' alleged injury, as compliance with the District Court injunction would not insure construction of new subsidized housing units in conformance with the revised HAP figures. Furthermore, the majority found that petitioners' financial interest claim was too speculative to permit standing since, by the terms of the injunction, the respondent communities could revise their applications and obtain their grants. As a result, there was no certainty that monies would be forfeited and available for redistribution within the Hartford metropolitan area.

In response, the dissenting judges argued that *Warth* and *Simon* did not mandate an inflexible rule of certainty

of benefit and that the majority had "read into the law of standing a test far more restrictive than any devised by the Supreme Court, a test that could threaten the viability of all litigation aimed at illegal agency action" (A 14). According to the dissenters, under this Court's recent decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 50 L.Ed.2d 450 (1977) the injury to a plaintiff may be indirect as long as it is traceable to the acts or omissions of the defendants and uncertainties can remain as to whether the relief afforded will in fact redress the alleged injury.

The dissenting opinion notes that the division of the court below resulted primarily from the conflicting views among the judges with respect to how to characterize the nature of the petitioners' claim. As Judge Oakes pointed out, petitioners did not seek to block the respondent towns from receiving grants under the 1974 Act, but to halt HUD from violating the provisions of the Act. Thus, Judge Oakes concluded,

> Had the plaintiffs not filed suit, all indications are that 1975 grants would have been disbursed illegally to the towns; moreover, HUD might well have continued its 1975 policy for a period stretching into the indefinite future (A 17).

By contrast, the majority of the Court did not consider the HUD violation of the 1974 law by itself to be critical, but instead questioned whether securing HUD compliance with the legislative requirements could be considered meaningful relief. Thus the majority undertook to determine the likelihood that housing units would in fact be constructed as a result of revision of the respondents' HAPs.* In the view of the dissenters, however, the peti-

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* This pursuit led the majority to emphasize testimony by HUD officials that Title II (providing for housing subsidy funds)

(footnote continued on following page)

tioners were entitled to secure the congressionally intended remedy—promotion of housing deconcentration—even if there was no assurance that deconcentrated units would be built during the 1975 fiscal year.

The responses to Hartford's financial interest claim further illustrate the disagreement below as to the degree of certainty that must be established. It is clear that Hartford had a statutory claim to any reallocated funds resulting from disapproval of grants to any of the seven suburbs.* The majority, citing *Warth,* imposed a standard which appears to require near certainty that monies will be forfeited and reallocated to Hartford. Thus, in the majority's view, Hartford, at the *outset* of the litigation, would have been required to prove that if it prevailed and secured an injunction halting the grants to its suburbs, these communities would refuse to revise their applications thereby assuring a pool of funds for redistribution (A 9).** The dissenting judges responded that, "There is scarcely any lawsuit that involves a certainty of recovery, from ad-

(footnote continued from preceding page)

had been exhausted for fiscal year 1975. Focusing on this testimony was misdirected, however, since it is clear that the HAP is to set goals for *all* low cost housing, federally subsidized or otherwise, and to establish housing goals beyond the particular year in question. Thus, an applicant must spell out its housing needs, on both short and long term bases, and the application must include three years' goals. See 24 CFR § 570.303(a)(c) (1976). See also discussion at A. 21, n. 4.

* HUD regulations provide that reallocation of Title I monies be carried out on a priority basis with such monies going first to the same metropolitan area where the funds were initially designated. 24 CFR § 570.409(d)(1).

** In fact, one of the original defendants, Windsor Locks, refused to revise its application and forfeited its 1975 grant. East Hartford still refuses to revise its application and has not indicated whether it would do so should plaintiffs ultimately prevail. HUD itself has rejected East Hartford's 1976 and 1977 requests for Title I money on the basis of inadequate applications. See affidavits submitted to Second Circuit with respect to petitioners' motion for a stay of mandate.

ministrative law to zoning. Such a standard has no support in *Warth* or *Simon,* much less in the more recent *Arlington Heights;* its adoption here significantly raises the barriers a litigant must cross in attempting to challenge illegal government action" (A 24-25).

This divergence of opinion as to the meaning of the *Warth-Simon-Arlington Heights* line of cases has resulted in the expenditure of an inordinate amount of time and energy among the lower courts. As noted, the *en banc* ruling below in the instant matter followed the similar turmoil in the Second Circuit on the scope and meaning of *Warth* in the *Evans* v. *Lynn, supra,* matter. In both this case and in *Evans* the Court, en banc, reversed a three judge panel determination. Given the sharp split in the Second Circuit on the proper standard to be applied in ruling on standing issues, there is every reason to suppose that other federal courts will experience similar difficulties. Beyond doubt, the persisting controversy on the issue of standing to sue confirms the need for further clarification and guidance by this Court.

II. There was substantial disagreement in the court below as to whether enforcement of the congressionally mandated remedy would in fact benefit petitioners. Review should be granted in order that this Court provide direction on the extent to which the lower courts may question legislative findings and remedies for purposes of determining standing.

Inherent in the lower court's ruling is a questioning of the effectiveness of the remedy Congress deemed appropriate to relieve the problems confronted by inner cities and their residents. When the majority below concluded that the revision of the HAPs would not benefit the petitioners sufficiently to warrant standing, it in effect substituted its judgment for that of the Congress as to what constitutes meaningful remedial action.

In passing the 1974 Act, Congress emphasized that its primary objective was "the development of viable urban communities by providing decent housing and suitable environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). Congress noted that a major problem in achieving that objective was the concentration of lower income persons in inner cities [42 U.S.C. § 5301(a)(1)] and therefore called for "the reduction of the isolation of income groups within communities and geographical areas . . . through the spatial deconcentration of housing opportunities for persons of lower income." *Id.*, at § 5301(c). This spatial deconcentration goal was to be accomplished by requiring applicants for Title I community development funds to include the expected to reside goal in the HAP section of their applications. Indeed, the ETR table constitutes the only link in the legislation between promoting and achieving housing deconcentration in metropolitan areas.

The petitioners argued, and the District Court so found, that when HUD approved Title I applications without requiring completion of the ETR table, Hartford's suburbs were relieved of their obligation to recognize the housing need for persons residing outside their jurisdictions. Thus the operative means for accomplishing a spatial deconcentration goal and for lessening the onerous burden on the cities was administratively negated. The majority below, rather than supporting the Congressional policy, challenged the importance of the ETR provision, characterizing the requirement as only an "educated guess" at the number of persons expected to move into a community.

Although one can argue that the ETR requirement in the application is not the most perfect mechanism for achieving housing deconcentration, this was the method Congress saw fit to adopt. If the petitioners—the intended beneficiaries of Congress' spatial deconcentration efforts—lack

sufficient interest to contest HUD's non enforcement of the provision, then certainly no one has standing to raise the issue and all federal judicial review in this area is effectively foreclosed. Petitioners do not believe, however, that it was the intent of the *Warth* or *Simon* rulings to immunize an agency's disregard for the law. This Court in *Warth* was careful to note that it did not intend to impinge upon Congress' prerogatives. Justice Powell stated in *Warth* that, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of the statute." 422 U.S. at 513-514. See also, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1973). Thus, this Court has instructed that the deprivation of the right to the legislative remedy itself constitutes injury in fact. See e.g., *Warth, supra,* 422 U.S. at 501.

Furthermore, it is clear that this Court, notwithstanding the imposition of additional barriers to establishing standing, adheres to the view that, "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of 'aggrieved persons' is symptomatic of that trend." *Association of Data Processing, Inc.* v. *Camp,* 397 U.S. 150, 154 (1970). See also, *United States* v. *SCRAP,* 412 U.S. 669 (1973); *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra; Arlington Heights* v. *Metropolitan Housing Development Corp., supra.*

Petitioners respectfully urge that this Court review this case in order that the lower federal courts be given guidance as to the appropriate standards to be applied in determining whether a complainant has standing to sue, particularly in a context in which Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out the legislative mandate.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant this writ of certiorari.

Respectfully submitted,

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CITY OF HARTFORD, on behalf of itself and its inhabitants, Richard Brown, Nicholas R. Carbone, John Cunnane, William A. DiBella, Allyn A. Martin, Richard Suisman, Margaret V. Tedone and Olga W. Thompson in their official capacity, Miriam Jordan and Fannie Mauldin,

Petitioners,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

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OPINION OF THE COURT OF APPEALS ON
REHEARING EN BANC, AUGUST 15, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76, 198, 199—September Term, 1976.

(Submitted March 30, 1977 Decided August 15, 1977.)

Docket Nos. 76-6049, -6050, -6059

EN BANC

CITY OF HARTFORD, MIRIAM JORDAN,
and FANNIE MAULDIN,

Plaintiffs-Appellees,

v.

TOWNS OF GLASTONBURY, WEST HARTFORD,
and EAST HARTFORD,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge*, and SMITH, FEINBERG,
MANSFIELD, MULLIGAN, OAKES, TIMBERS, GURFEIN,
VAN GRAAFEILAND and MESKILL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, 408 F.Supp. 889 (D. Conn. 1976), enjoining appellants from spending federal funds granted to them under Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301 *et seq.*, pending their com-

pliance with one of the requirements of that Act. A divided panel of this Court affirmed. On rehearing *en banc*, the Court of Appeals reversed and remanded with instructions to dismiss the complaint on the ground that the appellees lacked standing.

Judgment reversed and remanded.

RALPH G. ELLIOT, Hartford, Connecticut, *for Appellant Town of Glastonbury.*

JOHN J. LANGENBACH, West Hartford, Connecticut, *for Appellant Town of West Hartford.*

JAMES A. WADE, Hartford, Connecticut, *for Appellant Town of East Hartford.*

RICHARD F. BELLMAN, New York, New York (Mary R. Hennessey and Barry S. Zitser, Hartford, Connecticut, of counsel), *for Appellees.*

ANTHONY J. STEINMEYER, Attorney, Department of Justice, and Robert P. vom Eigen, Attorney, Department of Housing and Urban Development (Barbara Allen Babcock, Assistant Attorney General, Peter C. Dorsey, United States Attorney, Morton Hollander, Attorney, Department of Justice, Arthur J. Gang, Attorney, Department of Housing and Urban Development, of counsel), *for Secretary of Housing and Urban Development as Amicus Curiae.*

MESKILL, *Circuit Judge:*

The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, held that the

City of Hartford and two of its low-income residents have standing to challenge the propriety of the Department of Housing and Urban Development's ("HUD") approval of federal grants-in-aid to seven suburban communities in the Hartford area. On the merits, the District Court held that HUD had acted unlawfully in approving the grants. The communities were enjoined from drawing upon the Treasury or spending their funds pending the submission of lawful applications. 408 F.Supp. 889 (D. Conn. 1976). Three of the suburban communities appealed, and on December 23, 1976, a divided panel of this Court affirmed. The appellants petitioned for a rehearing *en banc*. It was urged that the jurisdictional issue was one of exceptional importance because it involves the standing of a municipality and its residents to challenge federal grants to a separate municipality. It was also urged that a rehearing *en banc* was necessary in order to secure uniformity of our decisions. A majority of the active judges agreed, and pursuant to Fed. R. App. P. 35(a) a rehearing was ordered on February 8, 1977. The appeal was submitted without further oral argument. We reverse the judgment of the district court, and remand the case with instructions to dismiss the complaint.

I.

The material facts of this dispute have been set forth in the opinions of the panel majority and dissent. Except for a further explanation of the nature of the so-called "expected to reside figure"—which is essential to an understanding of the issue of standing—the facts of this case will not be repeated here.

In order to obtain assistance under the Community Development Block Grant program created by Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301 *et seq.* ("1974 Act"), a town must submit

an application to the Secretary of Housing and Urban Development. That application must include, among other things, a "housing assistance plan." According to HUD's general instructions for the completion of the Housing Assistance Plan forms:

> The Housing Assistance Plan section of the Community Development Block Grant application consists of four forms and a map, with narrative explanations, showing, respectively: I. Survey of Housing Conditions; II. Housing Assistance Needs of Lower Income Households; III. Annual Goal for Housing Assistance; and IV. General Locations for Lower Income Housing.

Form II is designed to satisfy the community's obligation to "accurately . . . [assess] the housing assistance needs of lower income persons . . . in the community." 42 U.S.C. § 5304(a)(4)(A). That assessment must account for low-income persons who (1) actually reside in the community, (2) are displaced or are to be displaced, or (3) are expected to reside in the community. *Id.* The "expected to reside figure" at issue in this case represents the number of persons in this third category. Put another way, the expected to reside figure is a relatively small part of a very large application.

The expected to reside figure is merely an educated guess at the number of people who are going to move into the community. HUD's regulations refer to it as an "estimate." 24 C.F.R. § 570.303(c)(2). During 1975, the first year in which the Act was in effect, it became clear that accurate predictions of the future would not be easy to make. The methodologies used by many communities were unsophisticated, and it was difficult to obtain reliable data. These difficulties eventually led HUD to waive the requirement of an expected to reside figure, on the condition that

towns indicate on their applications what steps they planned to take in 1976 to arrive at acceptable estimates. The requirement was not waived in later years, and current regulations give applicants considerably more guidance than did those in effect in 1975. Nevertheless, the expected to reside figure remains a guess, albeit a better educated one.

A community's estimate of the number of low-income persons expected to reside within its borders has never been a self-fulfilling prophecy. The figure entered on a community's application does not alter its future population, but merely predicts it. It is theoretically possible for an expected to reside figure to influence the future availability of low-income housing in a given community, because federal housing assistance subsidies[1] are allocated to communities based in part on the anticipated needs reflected in their housing assistance plans. *See* Title II of the Housing and Community Development Act of 1974 § 213(d)(1), 42 U.S.C. § 1439(d)(1). In this case, however, the housing assistance plans submitted by the defendant towns fully utilized all available Title II funds. Therefore, even if the seven defendant communities had revised their expected to reside figures upward, no additional housing subsidies would have been obtained, because no additional funds were available.

With this background, we turn to the issue of standing.

II.

The plaintiffs in this action challenged the legality of HUD's waiver of the expected to reside requirement. It is our task to determine whether they have standing to make such a challenge. The applicable standards are clear:

---

1 Community development grants may not be used for housing.

> The essence of the standing question, in its constitutional dimension, "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." . . . The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect . . . but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions.

Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 45 U.S.L.W. 4073, 4076 (U.S. Jan. 11, 1977) (citations omitted). Furthermore, the plaintiff's injury must be one which is "likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). In other words, a plaintiff must show injury; he must trace it to the defendant's allegedly unlawful acts; and he must show that the remedy he seeks is likely to redress his injury.

Our analysis of this case begins with an examination of the injury alleged by the plaintiffs. The 1974 Act, it is claimed, was intended to benefit the plaintiffs in various ways. Specifically, it is designed to eliminate urban blight and create viable urban communities. 42 U.S.C. § 5301(c). It is also designed to reduce "the isolation of income groups within communities and geographical areas" and to increase "the diversity and vitality of neighborhoods." 42 U.S.C. § 5301(c)(6). These latter objectives are to be achieved by means of "the spatial deconcentration of housing opportunities for persons of lower income" and by means of "attract[ing] persons of higher income." *Id.* Plaintiffs allege that the Act is designed to encourage the

wealthy to return to the cities and to facilitate the movement of the poor into the suburbs.[2]

The plaintiffs claim that the defendants' unlawful acts—the submission and approval of applications without expected to reside figures—caused them injury because it made them less likely to benefit from the 1974 Act. This is said to injure both Hartford, which must bear the heavy burden of caring for its low-income residents, and the low-income residents themselves, who cannot find adequate housing in the suburbs. These claims will not withstand scrutiny.

Assuming *arguendo* that the plaintiffs have a legitimate, judicially cognizable expectancy interest in the benefits that should accrue to them under the Act, it is impossible to know whether the lack of expected to reside figures on the first year applications submitted by the defendant towns had, or will have, any detrimental effect on that interest.

If this were an appeal from a judgment granting the defendants' motion to dismiss for lack of standing, we would be required to accept as true all of the material allegations of the complaint. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). However, we are reviewing a final judgment based on a fully developed record, and the issue of standing is one on which the plaintiffs bear the burden of proof. *See Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 45. In this context, plaintiffs have either proved a "specific and perceptible harm," *United States* v. *SCRAP*, 412 U.S. 669, 689 (1973), or they have not. Here, they have not. It is theoretically possible that a failure to comply with *any* requirement in the Act will have a negative effect on the plaintiffs' expectancy

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2 We accept this interpretation only for purposes of discussion. It is by no means clear whether Congress sought to encourage inter-city spatial deconcentration or intra-city spatial deconcentration or both.

interest. In order to have standing, however, the plaintiffs must show more than a theoretical possibility:

> A plaintiff must [prove] that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.

United States v. *SCRAP, supra,* 412 U.S. at 688-89. Here, it is probable that the lack of compliance with the Act did not affect plaintiffs at all. The defendant towns' housing assistance plans have fully utilized all of the funds available for low-income housing subsidies under Title II of the Act. Because the only effect of the expected to reside figure is indirect—via Title II subsidies—and because no additional Title II subsidies are available, it is unlikely that the lack of expected to reside figures had any effect on the interests of the plaintiffs.

Moreover, it is speculative whether the relief sought by the plaintiffs—an injunction against the use of Title I funds pending the submission of applications complying with the Act—will redress their alleged injury. The only evidence in the record indicating the probable effect of increased expected to reside figures is contained in an affidavit from Lawrence L. Thompson, the Area Director of the Hartford Area Office of HUD. According to his affidavit, an upward revision of the defendant towns' expected to reside figures could not make additional housing subsidies available. Consequently, the prospect that the submission of accurate expected to reside figures sought by the plaintiffs will have a positive effect on the plaintiffs' expectancy interest is at best speculative.

The expected to reside figure is not a goal for the future which communities are required to satisfy, but merely a prediction of what is going to happen. It is a device used

to plan for future population changes, not a device for achieving them. A modification of the expected to reside figure would have no greater impact on the number of future residents than a modification of tomorrow's weather forecast would have on tomorrow's weather.

Much has been made in this case of the fact that if the defendant communities fail, or refuse to comply with the Act, their grants will be reallocated. This, it is claimed, will lead to the possibility that the plaintiffs would benefit from the reallocation of funds. This theory also is inadequate to support standing in the instant case. The relief sought and obtained by the plaintiffs left the defendants two choices: they could revise their figures and receive their grants, or they could refuse to comply and forfeit their grants. Inasmuch as the first alternative would produce no benefit for plaintiffs, it is immaterial whether they might benefit from the second—at least absent a "substantial probability" that the second alternative will in fact be chosen. *Warth* v. *Seldin, supra,* 422 U.S. at 504. Here, there was not the slightest showing that any of the defendant towns would choose to forfeit their grants rather than modify their applications.[3]

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3 We learn from events which have occurred after the district court rendered its decision that five of the original seven defendant towns have already revised their expected to reside figures and their applications now meet the approval of both HUD and the plaintiffs. Of the appellants, only East Hartford has not yet submitted a revised figure. East Hartford's failure to do so is consistent with its position that the figure of 131 included on its application was in fact correct. It has been suggested that East Hartford may be barred from revising its figure as a result of its failure to comply with a deadline for resubmission set by HUD after the district court's decree was entered. We need not consider what would happen if HUD, as one of the defendants in this action, sought, by means of such a deadline, to prevent East Hartford from following an order of the district court to comply with the 1974 Act. We have no doubt that HUD would be happy to permit East Hartford to correct its application, particularly if the Court held that the Act so required. In any event, the plaintiffs' standing must be judged

Thus, we conclude that the plaintiffs have failed to trace their alleged injury to the allegedly unlawful conduct of the defendants, and they have failed to demonstrate that the relief they seek would serve to redress that injury.

Accordingly, the judgment of the district court is reversed, and the cause is remanded with instructions to dismiss the complaint on the ground that the appellees lack standing.

KAUFMAN, *Chief Judge* (concurring):

I had occasion, earlier this Term, to compare some of the laws we are called upon to interpret to King Minos's labyrinth in ancient Crete, *Tim Lok* v. *I.N.S.*, 348 F.2d 37, 38 (2d Cir. 1977). Surely this is another case in point. Judge Oakes in his opinion for the panel found the "expected to reside" estimate the lynchpin of the statutory scheme, and the principal means by which the legislative objective of spatial deconcentration of low-income housing may be achieved. *Hartford* v. *Glastonbury*, Slip Op. 1081, 1087-89 (2d Cir., Dec. 23, 1976). The majority, in contrast, characterizes it as merely "a very small part of a very large application," *supra* at 5284. The facts before us do not require a choice between these two radically different views of the statutory pattern. Nor do I understand the majority's decision to be based on its evaluation of the importance of the "expected to reside" figure. I would, therefore, reverse without intimating any view concerning the general legislative pattern. At best an eagerness

as of the time this action was commenced. At that time, the prospect that East Hartford would forfeit its grant was even more remote than it is now. Events occurring after the filing of the complaint cannot operate so as to create standing where none previously existed. Any other rule would permit lawsuits to be maintained in the mere hope that the lawsuit itself would generate a constitutional "controversy" before the appellate process is complete.

to characterize the statute will be treated as *obiter dictum* in future cases; at worst, we risk prejudging situations yet unforeseen.

The test we must apply to measure standing is a deceptively simple one: is there a substantial likelihood that the City of Hartford or the individual appellees will benefit personally from the injunction they seek? *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The decree entered by the district court afforded the suburban towns two options: to submit a revised application for a community development grant, including a realistic "expected to reside estimate," or to forego HUD funds for FY 1975. I believe that where, as here, the relief sought permits the defendant two entirely practical options, *Simon* requires the plaintiff to demonstrate a substantial probability of benefit regardless of which course of action the defendant elects.

The appellees' principal objective in commencing this lawsuit was, of course, to compel the suburban towns to comply with the law. Hartford maintains that it will receive the very benefit Congress intended if the suburban towns successfully reapply for community development grants: relief from the burden flowing from concentration of low income people, all too often members of minorities, in the central city.

Considered abstractly, this argument has appeal. In our system of coordinate powers, the courts must ordinarily respect legislative judgments concerning the efficacy of statutes. *See Katzenbach* v. *Morgan*, 384 U.S. 641, 652-56 (1966); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cincinnati L. Rev. 199 (1971). Any other policy would require the judiciary to indulge in an independent assessment of the wisdom of Congressional action. To declare a duty prescribed by Congress too "speculative" to be enforced by an aggrieved litigant is

tantamount to saying it shall not be enforced at all. Therefore, although there should not be blind deference to legislatures, *see Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973) (involving "special status of criminal prosecutions in our system"), I would be exceedingly loathe to label "speculative" a chain of causation that, on the appellees' interpretation of the applicable law, Congress must have considered plausible.

Under the unusual circumstances presented here, however, it is not necessary to question congressional fact-finding to conclude that neither Hartford nor the individual appellees would benefit from compelling the suburbs to comply with the Act in 1975. I must emphasize that the action of HUD challenged in this suit is extremely limited. HUD did not permanently waive the "expected to reside" requirement, but rather approved *first year* applications without the needed figures.[1] Accordingly, general statements that the "expected to reside" figure is critical to achieving the overall statutory purpose of promoting deconcentration of low-income housing are beside the point: the essential issue is whether Hartford will benefit from the desired revision of the suburbs' FY 1975 application

1 The dissent asserts surprisingly, "Had the plaintiffs not filed suit, . . . H.U.D. might well have continued its 1975 policy for a period stretching into the indefinite future." *Infra* at 5296-7. But H.U.D.'s policy in years subsequent to 1975 is not at issue in this lawsuit. No one until now has ever questioned H.U.D.'s determination to require the expected-to-reside estimate as soon as an appropriate method of calculation was devised, and there is no evidence before us that H.U.D. even considered its suspension of the requirement past fiscal 1975.

In view of the insistence in the dissenting opinion on a precise formulation of the interest at stake in this lawsuit, I find Judge Oakes's broad formulation particularly troubling. It is impossible to avoid making standing doctrine more confusing than it already is if every case is seen as posing, in the most general terms, a mortal challenge to judicial review of administrative action. It is possible for standing cases to be of less than earthshaking importance. I believe the issues unnecessarily raised by both the plurality opinion and the dissent should be left for another day.

for community development funds. It is impossible to show that *any* housing units are likely to be built as a result of the Towns' eventual compliance with the "expected to reside requirement" in their FY 1975 application. Indeed, since the suburbs received the maximum available subsidies for low and moderate income housing that year, it is inconceivable that submitting an adequate "expected to reside" estimate could have any effect on deconcentration of housing for the poor in the Hartford metropolitan area.

A great deal has been made of the possibility that the City of Hartford will be near the front of the queue for funds available for reallocation as a result of East Hartford's failure to reapply. But, as Judge Meskill points out, standing cannot be established by hindsight. It must be assessed at the outset of a lawsuit. *See, The Supreme Court*, 1975 Term, 90 Harv. L. Rev. 56, 210 (1976). It would be absurd—and wasteful—to permit litigation to be maintained in the mere hope that "a constitutional controversy [will emerge] before the appellate process is complete." *Supra* at 5289-5290, n.3 (2d Cir. 1977). Accordingly, I believe that a plaintiff must demonstrate a likelihood of benefit wholly apart from a defendant's response to the district court's decree. Where, as here, compliance with the conditions sought in the lower court's order would be of no tangible value to the plaintiffs, the possibility that the defendants will fail to comply does not justify proceeding with the lawsuit. Thus, I do not believe that the mere chance Hartford will receive a portion of the $440,000 available for reallocation as a result of East Hartford's refusal to reapply for a community development grant for FY 1975—a chance that seems minimal in any event—would suffice to confer standing on Hartford or its low-income residents.

OAKES, *Circuit Judge* (dissenting), with whom Judges Smith, Feinberg and Gurfein concur:

The anomalies in this case might cause a lay observer to question the rationality of the judicial process. Plaintiffs' principal purpose in bringing suit was to stop a federal agency (HUD) from violating the law (the Housing and Community Development Act of 1974 or HCDA) in a manner adverse to plaintiffs' interests. Following a district court ruling that HUD had indeed violated the law, the agency did not appeal; instead, it revised its regulations (for fiscal years after 1975) to meet the plaintiffs' objections. Having achieved this goal by virtue of bringing suit, plaintiffs now are told by the en banc majority that they lacked a sufficient interest in the outcome at the time they filed the suit and hence that they lacked standing to sue. This holding becomes particularly anomalous when one considers that, as Judge Meskill's plurality opinion recognizes, —— F.2d at —— n.3, it is more likely today than when the suit was initiated that Hartford, had it been successful on the standing issue, would have received reallocated fiscal year 1975 funds as the result of the suit it brought. In view of what has actually occurred as a result of the suit, the majority's conclusion that no cognizable interest existed at the suit's outset requires at the very least careful scrutiny.

I believe that both the plurality opinion and Chief Judge Kaufman's concurring opinion misconceive the nature of this suit. They also fail to appreciate the underlying purpose of the statute under which the suit was brought. But more important, perhaps, they read into the law of standing a test far more restrictive than any devised by the Supreme Court, a test that could threaten the viability of all litigation aimed at illegal agency action. In an area of the law that many commentators have decried as confused,

see, e.g., K. Davis, *Administrative Law Text* § 22.01 (3d ed. 1972); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 425 n.1 (1974); Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 Stan. L. Rev. 433, 434 (1962); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 645 n.1 (1973), and that Professor Paul Freund has called "among the most amorphous in the entire domain of public law," *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., pt. 2, at 498 (1966), the two opinions of the en banc majority have succeeded only in further muddying the waters. Accordingly, I dissent.

I.

The Nature of the Suit

The way in which a suit is characterized has much to do with whether plaintiffs are deemed to have standing. If the purpose of the suit is misperceived, the interest of the plaintiffs is likely to be misconceived, since the latter turns on the former and the former shapes the latter. Here the majority fails to examine the suit's principal purpose and, as a result, misunderstands the nature of the plaintiffs' interest.

The majority views this suit as if its principal purpose were to prevent the defendant towns from receiving fiscal 1975 grants under the HCDA. They rely on the fact that the towns had an option under the injunction ultimately issued by the court below, an option of revising their Housing Assistant Plans (HAPs) with regard to the expected-to-reside (ETR) figures, thereby qualifying to seek dissolution of the injunction and release of the grant funds originally sought. On this basis the majority concludes

that the plaintiffs could not have had a substantial probability of benefiting from the suit. But the suit was not brought to prevent the defendant towns from receiving grant monies, nor was it brought to obtain revision of one particular year's ETR figures for these towns. Rather, it was brought with the goal of halting the violation by HUD, a federal administrative agency, of the HCDA, an Act of Congress that the agency was charged with enforcing for the benefit of cities like Hartford.

HUD officials were initially the only defendants named in the complaint, which alleged that they had failed to meet their obligations under the HCDA. Because, at the time the suit was filed, HUD had already issued letters of credit to the towns whose grants were being challenged, HUD and the towns moved to join the towns as defendants, and the district court granted the motions, *see City of Hartford* v. *Hills*, 408 F. Supp. 879, 882 (D. Conn. 1975) (opinion granting preliminary injunction). But the entry of the towns, while necessary to ensure an adequate remedy, did not change the nature of the suit as one aimed at violation of law by a federal agency. While the towns may have had the option on which the plurality and concurring opinions put such emphasis—that of revising their HAPs rather than forfeiting grant funds—HUD had no options; it had to enforce the statute as written. That it was not doing so at the time the suit was filed is clear from its failure to appeal and its adoption of explicit ETR regulations for post-1975 grants, 24 C.F.R. §570.303(c)(2)(i) and (ii) (1976); *see* 41 Fed. Reg. 11128 (1976), as well as from Judge Blumenfeld's ruling below, upheld by the panel majority.[1] Had the plaintiffs not filed suit, all indications

1 The en banc majority does not, of course, reach the merits, as it finds a lack of standing. This opinion will not comment further on the merits, which are analyzed in the panel majority opinion, *ante*.

are that 1975 grants would have been disbursed illegally to the towns; moreover, HUD might well have continued its 1975 policy for a period stretching into the indefinite future. It was these abuses that plaintiffs, particularly the City of Hartford, sought to prevent by filing suit, and it is with this purpose in mind that any analysis of plaintiffs' interest in the suit must proceed.

II.

The Statute and the City of Hartford

Once it is accepted that the plaintiffs' principal objective in filing suit was to secure compliance by HUD with the law, analysis begins with the question why the plaintiffs cared about this objective. The panel majority opinion answers this question in some detail as to both the City and the low-income plaintiffs. I will not repeat that analysis here, but further examination of the interest of the City in particular is necessary in light of the en banc plurality and concurring opinions. To understand how Hartford would benefit from HUD insistence on adequate HAPs from Hartford's suburbs, one must first understand both the nature of the City of Hartford and the structure of the HCDA.[1]

Based on uncontested affidavits and testimony, the district court found that "Hartford is one of the American central cities, suffering from a concentration of lower-income persons. . . ." *City of Hartford* v. *Hills*, 408 F.

2 I am puzzled by the concurring opinion's attempt to "reverse without intimating any view concerning the general legislative pattern." *Ante*, —— F.2d at ——. The essence of Hartford's claim here is that it was deprived of legal rights that were created by the HCDA, as discussed *infra*. The allegation of such a deprivation confers standing on the injured party. *Warth* v. *Seldin*, 422 U.S. 490, 514 (1975); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). One cannot determine what rights Hartford had under the HCDA without careful examination of "the general legislative pattern."

Supp. 889, 893 n.14 (D. Conn. 1976) (opinion granting permanent injunction). The court noted *inter alia* the large number (over 50%) of Hartford residents receiving government assistance, the high unemployment rate in the city (13.6%), and the high minority population (35.5% overall; 80% of the school population). *Id.* The court characterized "[t]he housing situation in Hartford [as] bleak," basing this assessment on the large number of "substandard, deteriorating or dilapidated units" and on the "critical housing shortage in the City, resulting in severe overcrowding." *Id.* at 893-94 n. 14. Comparing the condition of Hartford in these respects to that of its suburban towns, the court found a "marked contrast." *Id.* at 894 n.14. Since these findings are not in any way challenged here, no more need be said about the characteristics and problems of the City of Hartford; one doubts if the staid prose of an appellate opinion could accurately portray them in any event.

The HCDA and its legislative history leave little doubt that the Act was designed to assist cities in the precise position in which Hartford finds itself. The Act begins with a congressional finding that urban problems arise from, *inter alia*, "the concentration of persons of lower income in central cities." 42 U.S.C. § 5301(a)(1) (Supp. V 1975). The "primary objective" of the Act—not some collateral purpose—is declared to be "the development of viable urban communities," with "specific objectives" including "the elimination of slums and blight" and of "conditions which are detrimental to health, safety, and public welfare" and "the reduction of the isolation of income groups within communities and *geographical areas* . . . through the spatial deconcentration of housing opportunities for persons of lower income." *Id.* § 5301(c) (emphasis added). These declarations leave very little doubt about congressional intent, and the legislative history reinforces the

conclusion that the design of the Act was to assist cities like Hartford. The Senate Report notes Congress's desire "to insure that Federal funds . . . be used with a priority to eliminate slums and blight and to upgrade and make the Nation's cities more livable, attractive and viable places in which to live." S. Rep. No. 93-693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4273, 4274. The Report also emphasizes the importance of "urban-suburban cooperation on housing and renewal." *Id.* at 4320.[3]

There is thus little question that the HCDA in general was designed to assist cities like Hartford. Within the HCDA framework, moreover, the ETR estimate required in the HAP plays a crucial role. Community development grants cannot be made by HUD unless an application has been submitted, 42 U.S.C. § 5304(a) (Supp. V 1975), and the application *must* include a HAP that, *inter alia*, "assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside in the community." *Id.* § 5304(a)(4)(A). While certain other application requirements may be waived by HUD, the HAP requirement may not be waived. *See id.* § 5304(b)(3), (4); 408 F. Supp. at 898, 901. Both Congress and HUD have emphasized the importance of the HAP. *See*

3 In light of this statement and the Act's reference to "the isolation of income groups within communities and geographical areas," 42 U.S.C. § 5301(c)(6) (Supp. V 1975), it is little short of incredible that the plurality opinion expresses doubt whether the HCDA was intended to promote intercity spatial deconcentration, *ante*, —— F.2d at —— n.2. *See also* 42 U.S.C. § 5301(a)(1) (Supp. V 1975) (congressional concern about "the concentration of persons of lower income in central cities"); *id.* § 5304(a)(1) (development planning to be on "areawide" basis); *id.* § 5304(a)(4)(C) (lower-income housing to be located with objective of "avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons"). If nothing else were clear, it is at least clear that the Housing and Community Development Act of 1974 was not just another simple form of revenue-sharing, with suburbs walling out the cities' poor.

H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 3 (1974), *quoted in* panel op., *ante*, —— F.2d at —— n.8; HUD Notice of Proposed Rulemaking, 41 Fed. Reg. 2348 (1976), *quoted in* panel op., *ante*, —— F.2d at —— n.9.

The significance of the ETR figure is apparent when the HCDA's "carrot and stick" approach is considered. All communities, wealthy as well as poor, are interested in obtaining community development funds, which may be used for such local needs as street lights, playgrounds, and senior citizen centers. *See* 42 U.S.C. § 5305(a) (Supp. V 1975); 24 C.F.R. § 570.200(a) (1976). In order to obtain these funds under the Act, however—and this is what is of critical importance—"a locality must address its need for lower-income housing," United States Commission on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* 32 (1975). This need simply cannot be addressed without an accurate estimate of the number of lower-income persons expected to reside in the locality. The ETR figure is tied directly to housing assistance by 42 U.S.C. § 1439(a) (Supp. V 1975), which allows either a locality or HUD to reject an application for federal housing aid on the ground that it is inconsistent with the locality's HAP.

Once the operation of the statute and the characteristics of Hartford are understood, the nature of Hartford's injury from the suburban towns' submission of zero or inadequate ETR figures becomes clear. As a central city, Hartford has been given by the HCDA "a statutory right or entitlement," *Warth* v. *Seldin*, 422 U.S. 490, 514 (1975), to cooperation from its suburbs (at least those applying for community development grants) with regard to the deconcentration of lower-income persons and the elimination of slums and blight, 42 U.S.C. § 5301 (Supp. V 1975). An alleged deprivation of such a right creates standing. *Warth* v. *Seldin*, *supra*, 422 U.S. at 514. By submitting zero

ETR figures, the defendant towns significantly reduced the likelihood that any deconcentration beneficial to Hartford would occur.[4] For example, were a developer to apply for federal aid in building lower-income housing in one of the towns, the town could legitimately oppose the request—and thus effectively block construction of lower-income housing—simply by objecting under 42 U.S.C. § 1439(a)(2) (Supp V 1975) that such housing is inconsistent with its approved HAP, which indicates that no additional lower-income persons are expected to reside in the town. The Act was designed to prevent abuses of this sort, and it seems probable that no entity other than a city like Hartford would be interested in halting such violations of the letter and spirit of the law, at least when HUD is countenancing these violations. In short, I believe that Hartford

4 The plurality and concurring opinions both mention that there were no more fiscal 1975 Title II funds available for the defendant towns, even if their ETR figures for that year were revised upward. The location and types of lower-income housing, however, might very well be affected by appropriate revision of the ETR figures; certainly Congress thought that there would be some impact when it required the ETR estimates. Moreover, the chronological relationship between the Title I HAP and the Title II housing grants is unclear on the record before us. It appears from the regulations that Title II funds for at least two fiscal years after 1975 may be based on the 1975 HAPs. The community development plan summary submitted with the application is a "three-year . . . plan which . . . specifies both short and long-term community development objectives which have been developed in accordance with areawide development planning and national urban growth policies." 24 C.F.R. § 570.303(a) (1976). The ETR assessment required to be included in the HAP is a projection covering "the next three years." *Id.* § 570.303(c)(2)(i). The HAP must specify "a realistic annual goal and also a three year goal for the number of dwelling units or persons to be assisted." *Id.* § 570.303(c)(3). And it is to be noted that:

> Where substantial housing needs are identified pursuant to paragraph (c)(2) of this section, and housing assistance resources are available, the Secretary may determine that Housing Assistance Plans with only minimal housing goals are plainly inappropriate to meeting the needs pursuant to the standards of review in § 570.306(b).

Id. § 570.303(c)(3)(v).

stood to benefit from this suit both by forcing a change in overall HUD policy—a benefit that has been realized—and by forcing its suburbs to assist with the HCDA's spatial deconcentration objective in return for their receipt of community development funds—a benefit that, to the extent ETRs have been revised upward in the resubmitted applications, also has been realized.

III.

The Law of Standing

The plurality and concurring opinions both adopt a standing test based on the fact that, under the district court's injunction, the defendant towns could either revise their ETR figures or forego community development grant funds. From this the plurality concludes, citing *Warth* v. *Seldin*, *supra*, 422 U.S. at 504: "Inasmuch as the first alternative would produce no benefit for plaintiffs, it is immaterial whether they might benefit from the second. . . ." *Ante*, —— F.2d at ——. The concurring opinion's similar conclusion is said to be compelled by *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Parts I and II of this dissent demonstrate how the factual premise of both opinions is erroneous. Here I point out that no legal analysis is offered in either opinion to explain how *Warth* and *Simon*, in which plaintiffs sought invalidation of legislative or executive rules, are relevant to a case involving a district court injunction that gives the defendants a choice of actions. Both cited cases do, of course, contain general language about the necessity for a plaintiff to show "'a substantial probability" of benefit from judicial intervention, *Warth*, 422 U.S. at 504, or "an injury to himself that is likely to be redressed by a favorable decision," *Simon*, 426 U.S. at 38. But these unexceptionable propositions hardly help to

resolve this case; they are simply the starting point of analysis.

Even assuming arguendo that the option given the localities is relevant to Hartford's standing to challenge HUD policy—as discussed in Part I *supra*, the suit's principal purpose was to force a change in a HUD policy that was adversely affecting the City of Hartford—I cannot accept the factual premise that upward revision of the defendant towns' ETR figures would produce no benefit for Hartford. I have discussed the way in which Hartford would benefit in Part II. It is true that the injury is indirect, but the Supreme Court recently reaffirmed that such injury is sufficient for standing purposes if it is "fairly traceable to the defendant's acts or omissions," *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073, 4076 (U.S. Jan. 11, 1977). Here the injury to Hartford is traceable to the towns' submissions and HUD's approvals of inadequate HAPs, as discussed in Part II. It may also be true that the injury to Hartford is not directly measurable in dollars and cents; "[i]t has long been clear," however, that other kinds of injury than the purely monetary will support standing, *id.* Finally, the injury alleged plainly has "that 'essential dimension of specificity' that informs judicial decision-making." *Id.*, *quoting Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974). Hartford did not seek an abstract change in HUD policy, but rather a specific remedy with regard to particular grant applications made by *its* suburbs whose applications did not conform to the statutory requirements.

I therefore restate that the factual premise of the majority's approach is unsupportable. But even if it is assumed arguendo that Hartford would not benefit from revision of the ETR figures, there nevertheless was a sufficient probability of Hartford's obtaining reallocated

funds to support the City's standing here. The injunction blocked over four million dollars in grant funds to seven towns. A prediction made when the suit was filed would have to have acknowledged a "substantial probability" that at least some of those funds would be reallocated to Hartford as the result of a town choosing not to, or being unable to, submit an acceptable ETR figure, and indeed time has shown that monies would but for the instant decision en banc have become available for reallocation.[5] Hartford's eligibility therefor is discussed in the panel majority opinion. *Ante*, —— F.2d at ——; *see* 408 F. Supp. at 885-86. It matters not at all how small the predicted sum might be, as long as "a distinct and palpable" benefit were involved. *Warth* v. *Seldin, supra*, 422 U.S. at 501; *see* K. Davis, *Administrative Law of the Seventies* § 22.02-10, at 507 (1976) ("The line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury.").

As in *Arlington Heights, supra*, 45 U.S.L.W. at 4076, "[a]n injunction would not, of course, guarantee" that grant funds would be reallocated; "uncertainties" would remain. But the Supreme Court in *Arlington Heights* made clear that such uncertainties do not defeat a standing claim. *Id. See also United States* v. *SCRAP*, 412 U.S. 669 (1973). The plurality and concurring opinions appear to demand more, something approaching a certainty that funds would be reallocated to Hartford. There is scarcely any lawsuit that involves a certainty of recovery, from administrative law to zoning. Such a standard has no support in *Warth* or *Simon*, much less in the more recent *Arlington Heights;* its adoption here significantly raises

5 The supplemental brief of HUD as amicus curiae tells us that two municipalities did not submit applications pursuant to the revised procedures. HUD tells us that absent affirmance it will remove the "holds" on these funds.

the barriers a litigant must cross in attempting to challenge illegal governmental action.

Hartford has shown injury to itself and a probability of benefit from judicial intervention. It should therefore be held to have standing. To deny Hartford standing means, in Chief Judge Kaufman's words, that "it is unlikely that there could ever be a plaintiff who will be allowed access to the courts to challenge HUD's abdication of its congressionally-imposed duty." *Evans* v. *Lynn*, 537 F.2d 571, 611 (2d Cir. 1976) (opinion dissenting from en banc decision), *cert. denied*, 45 U.S.L.W. 3489 (U.S. Jan. 17, 1977). Today's holding, in short, "give[s] the Executive a silent veto not provided in the Constitution." *Id.* (Gurfein, *J.*, dissenting from en banc decision). I dissent.

OPINION OF THE COURT OF APPEALS,
DECEMBER 23, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76, 198-99—September Term, 1976.

(Argued September 16, 1976 Decided December 23, 1976.)

Docket Nos. 76-6049, -6050, -6059

CITY OF HARTFORD, MIRIAM JORDAN, and FANNIE MAULDIN,

Plaintiffs-Appellees,

v.

TOWNS OF GLASTONBURY, WEST HARTFORD,
and EAST HARTFORD,

Defendants-Appellants.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, enjoining appellants from drawing upon or spending community development grant funds awarded under the Housing and Community Development Act of 1974, on the ground that the Department of Housing and Urban Development had unlawfully approved grant applications lacking valid estimates of the number of lower income persons "expected to reside" in the community, 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975).

Affirmed.

RALPH G. ELLIOT, Hartford, Conn., *for Appellant Town of Glastonbury.*

JOHN J. LANGENBACH, West Hartford, Conn., *for Appellant Town of West Hartford.*

JAMES A. WADE, Hartford, Conn., *for Appellant Town of East Hartford.*

RICHARD F. BELLMAN, New York, N.Y. (Mary R. Hennessey) and Barry S. Zitser, Hartford, Conn., of counsel), *for Appellees.*

ANTHONY J. STEINMEYER, Attorney, Department of Justice, and Robert P. vom Eigen, Attorney, Department of Housing and Urban Development (Rex E. Lee, Assistant Attorney General, Peter C. Dorsey, United States Attorney, Morton Hollander, Attorney, Department of Justice, Arthur J. Gang, Attorney, Department of Housing and Urban Development, of counsel), *for Secretary of Housing and Urban Development as Amicus Curiae.*

OAKES, *Circuit Judge:*

The history of federal aid to the beleagured cities of the United States has seen a transition from urban renewal to the Model Cities Program, which expanded categorical grants for urban needs, to general revenue sharing in the 1970s, with accompanying block grants in general functional areas, such as manpower training, education and law enforcement. One of the more recent block grant programs is that for "community developments grants," authorized

by the Housing and Community Development Act of 1974, § 103, 42 U.S.C. § 5303 (Supp. V 1975). This appeal, apparently the first of its kind to be decided under the 1974 Act,[1] requires us to decide whether the Department of Housing and Urban Development (HUD) improperly approved certain applications for community development grants.

The City of Hartford, Connecticut, and two of its low-income residents have sued to enjoin seven suburban communities from receiving or expending grants approved by HUD under the Act, principally on the ground that the grant applications either contained no estimate, or an arbitrary, wholly inaccurate estimate, of the number of lower income persons "expected to reside" within the community, an apparent violation of 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). A permanent injunction was entered by the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Judge. *City of Hartford* v. *Hills*, 408 F. Supp. 889 (D. Conn. 1976). The towns of Glastonbury, West Hartford and East Hartford appeal; HUD does not appeal, nor do the other towns that were originally defendants and have been enjoined by the order below. We affirm.

1 *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480 (U.S. Apr. 20, 1976), was an attack upon HUD housing policies generally, and the remedial order under review was issued in 1969, long before passage of the Housing and Community Development Act. The *Gautreaux* Court did refer to the 1974 Act, however, *id.* at 4486-87 & n.21, including quotation of the Title I objective of "promoting greater choice of housing opportunities and avoiding undue concentration of assisted persons," 42 U.S.C. § 5304(a)(4)(C)(ii), and citation of the district court's opinion in the instant case. 44 U.S.L.W. at 4487 n.21.

There is a district court decision dealing with alleged deficiencies in a grant application submitted under Title I of the Act, the court holding that the plaintiffs had produced insufficient evidence that the application had been improperly approved. *Ulster County Community Action Comm., Inc.* v. *Kornig*, 402 F. Supp. 986, 990 (S.D.N.Y. 1975).

I. Facts

A. *The Structure of the Act*

Title I of the Housing and Community Development Act of 1974 established a new system of federal assistance for community development activities, to be administered by HUD, and consolidated and superseded previous categorical programs,[2] each of which had specified purposes and particular statutory and administrative restrictions. Title I, in short, was intended to create a streamlined program dealing comprehensively with urban problems previously addressed in a piecemeal fashion. *See* S. Rep. No. 93-693, 93d Cong., 2d Sess. 1-2, 48-49, *reprinted in* [1974] U. S. Code Cong. & Ad. News 4273, 4273-74, 4318-19; H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 2-3 (1974). The community development grants authorized by the Act may be used by localities in a variety of ways related to improvement of the physical and economic environment, such as for the acquisition of blighted land and historic sites, the construction or improvement of street lights and playgrounds, the enforcement of housing codes in deteriorating areas, and the development of community and management planning capabilities. 42 U.S.C. § 5305 (Supp. V 1975); *see* 24 C.F.R. § 570.200(a) (1976). The Title I funds may not be used, however, for the construction of housing or the payment of housing allowances, with minor exceptions not relevant here, *id.* § 570.201(f), (g).[3] These matters are

2 The programs consolidated included ones for urban renewal, Model Cities, water and sewer facilities, and open-space land. *See* 42 U.S.C. § 5316; *City of Hartford* v. *Hills*, 408 F. Supp. 889, 897 n.27 (D. Conn. 1976).

3 The exceptions relate to use of funds for so-called "last resort housing," *see* 24 C.F.R. § 43.1 *et seq.* (1976), and for relocation assistance payments for persons displaced by activities funded by grant monies, *see id.* § 570.200(a)(11).

covered elsewhere in the Act, particularly in Title II, codified at 42 U.S.C. § 1437 *et seq.* (Supp. V 1975).

In terms of administrative review, Title I represents a compromise between the Administration's revenue sharing approach, under which communities would have automatically received funds on the basis of objective needs criteria, without any application or review process, and the approach favored by some members of Congress, which would have imposed substantial federal preconditions to grant awards and established elaborate application and review procedures. *See generally* Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 Urban Law. 189, 191-200 (1975). The Act requires that communities apply to HUD, 42 U.S.C. § 5304(a) (Supp. V 1975), but limits HUD's review power in several ways. Cities and counties are declared "entitled" to the grant funds, *id.* § 5306(a), and an application is deemed approved 75 days after receipt by HUD unless the Secretary gives the applicant "specific reasons for disapproval," *id.* § 5304(f). The Secretary must approve an application, moreover, unless she determines, *inter alia*, that the applicant's description of community "needs and objectives is plainly inconsistent with [generally available] facts or data," *id.* § 5304(c).[4]

4 42 U.S.C. § 5304(c) (Supp. V 1975) provides in full:

> The Secretary shall approve an application for an amount which does not exceed the amount determined in accordance with section 5306(a) of this title unless—
>
> (1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or
>
> (2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant pursuant to subsection (a) of this section; or
>
> (3) the Secretary determines that the application does not comply with the requirements of this chapter or other applicable law or proposes activities which are ineligible under this chapter.

Finally, with regard to requirements that an applicant comply with certain civil rights laws and provide for citizen participation in the grant planning process, the Secretary may rely upon the "satisfactory assurances" of the applicant, rather than make an independent investigation. *Id.* § 5304(a)(5), (6).

While community development grants may not be used for housing, Title I was designed in part to "[foster] the undertaking of housing and community development activities in a coordinated and mutually supportive manner." *Id.* § 5301(d)(4). Moreover, specific objectives of the Title include provision of "a decent home," especially for those with low and moderate incomes, *id.* § 5301(c)(3), and "the spatial deconcentration of housing opportunities for persons of lower income," *id.* § 5301(c)(6).[5] In accordance

5 42 U.S.C. § 5301(c) (Supp. V 1975) provides in full:

> The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives—
>
> (1) the elimination of slums and blight and the prevention of blighting influences and the deterioration of property and neighborhood and community facilities of importance to the welfare of the community, principally persons of low and moderate income;
>
> (2) the elimination of conditions which are detrimental to health, safety, and public welfare, through code enforcement, demolition, interim rehabilitation assistance, and related activities;
>
> (3) the conservation and expansion of the Nation's housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income;

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with these goals, the grant application submitted to HUD must include a "housing assistance plan" (HAP) that "accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside in the community . . . ," *id.* § 5304(a)(4)(A), with "a realistic annual goal" specified for housing assistance, *id.* § 5304(a)(4)(B).[6] The housing needs detailed in the HAP

(4) the expansion and improvement of the quantity and quality of community services, principally for persons of low and moderate income, which are essential for sound community development and for the development of viable urban communities;

(5) a more rational utilization of land and other natural resources and the better arrangement of residential, commercial, industrial, recreational, and other needed activity centers;

(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income; and

(7) the restoration and preservation of properties of special value for historic, architectural, or esthetic reasons.

It is the intent of Congress that the Federal assistance made available under this chapter not be utilized to reduce substantially the amount of local financial support for community development activities below the level of such support prior to the availability of such assistance.

6 42 U.S.C. § 5304(a)(4) (Supp. V 1975) provides in full (emphasis added):

No grant may be made pursuant to section 5308 of this title unless an application shall have been submitted to the Secretary in which the applicant—

. . .

(4) submits a housing assistance plan which—

(A) accurately surveys the condition of the housing stock in the community and *assesses the housing assistance needs of lower-income persons* (including elderly and handicapped persons, large families, and persons displaced or to be displaced) *residing in or expected to reside in the community,*

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion

can then be met with funds available under Title II of the Act. Thus (and this is crucial to the case) the HAP serves as the vehicle tying together the community development and housing assistance portions of the Act. in furtherance of the Act's overall goal of coordination of federal urban efforts, *see id.* § 5301(d). The critical importance of the HAP in the overall scheme of the 1974 Act is underscored in the Act itself[7] and in the legislative history;[8] it has been

of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance *best suited to the needs of lower-income persons in the community*, and

(C) indicates the general locations of *proposed housing for lower-income persons*, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects[.]

7 42 U.S.C. § 5304(b)(3) and (4) (Supp. V 1975) together allow the Secretary of HUD, under certain conditions, to waive or otherwise dispense with all of the application requirements in subsection (a) *except* the housing assistance plan requirement. The district court observed that this exclusion showed "the pivotal role [Congress] intended for the HAP." 408 F. Supp. at 898; *see id.* at 901.

8 The House Report states:

This [housing assistance plan] requirement, together with provisions in title II of the bill which allocate housing assistance funds to communities based, in part, on the housing needs specified in these plans, will make it possible for communities to plan unified community development and housing programs. For the first time, after nearly three decades, of Federal aid for housing and community development, communities will be able to coordinate the location of new housing units with existing or planned public facilities and services, such as schools, transportation, police and fire protection, recreational facilities, and job opportunities. The committee bill will put an end to a system of support for community development and housing activities which recognizes their close relationship but fails to provide the mechanisms necessary to permit them to be undertaken on a unified basis.

H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 3 (1974).

recognized by HUD[9] and was fully appreciated by the court below.[10]

B. *Appellants' Grant Applications*

The three suburban towns here involved submitted applications for community development grants to HUD in the spring of 1975, after having first sent the applications "for review and comment" to the Hartford region's areawide planning agency, the Capital Region Council of Governments (CRCOG), pursuant to 42 U.S.C. § 5304(e) (Supp. V 1975). The CRCOG received adverse comments on the HAP and other aspects of the applications from the City of Hartford and a Hartford civil rights group, and it forwarded these comments to HUD. The HUD regional director in Boston, in a late April memorandum to the director of HUD's Hartford office, found the City's comments in particular to be "well documented and of a very serious nature." In addition, the area director of HUD's Equal Opportunity Division recommended disapproval of all three applications.

While the Hartford office was in the process of reviewing the applications in light of these criticisms, it received a May, 1975, memorandum from HUD's Assistant Secretary for Community Planning and Development. That memorandum recognized that both grant applicants and HUD were having difficulty estimating the number of low-income persons "expected to reside in the community," an estimate

9 The "Notice of Proposed Rulemaking" that introduced part of the proposed HUD Title I regulations termed the HAP "one of the most significant parts of the community development application process" and mentioned its "significant impact on various aspects of HUD-assisted housing program activities." 41 Fed. Reg. 2348 (1976).

10 408 F. Supp. at 898.

central to the HAP, *see* note 6 *supra*, and suggested possible sources of data from which HUD might develop its own figures. It also gave applicants an option that eventually led to this case: instead of developing its own "expected to reside" figure or accepting HUD's, a locality could obtain approval of its application simply by "indicat[ing]" the steps it would take to "identify a more appropriate needs figure by the time of its second year submission." The memorandum was quite explicit as to the meaning of this option: HUD would not require the adoption of *any* "expected to reside" figure on first year grant applications such as those in issue here.

Appellants West Hartford and Glastonbury, along with several other towns, accepted the option offered by HUD and thus submitted zero figures for the "expected to reside" portion of the HAPs in the final applications approved by HUD.[11] The two towns were granted $999,000 and $910,000 respectively. East Hartford's application had been approved prior to receipt of HUD's May memorandum, and it contained an "expected to reside" figure of 131, derived exclusively from the waiting list of the town's public housing authority. East Hartford was granted $440,000.

11 Appellants have raised the fact that Hartford itself, in applying for community development funds (which it received), also submitted a zero "expected to reside" figure in its HAP. Since Hartford's application was never challenged on this ground, however, its "expected to reside" figure is irrelevant to the claim against appellants. There was testimony before the district court, moreover, indicating that Hartford's zero figure was not necessarily a result of HUD's May memorandum, but was rather based upon consideration of current and projected population trends. Hartford's Director of Planning stated that Hartford's population was declining, so that, while its application listed a large number of low-income persons residing in the city, it was expected that any new low-income residents would be offset numerically by others leaving Hartford for the suburbs, where the population was increasing. He thus concluded that Hartford's zero figure for new low-income residents was both "fair" and "realistic."

II. Standing

Appellants challenge the standing of both the City of Hartford and the low-income plaintiffs to seek the injunction granted by the court below. The district court concluded that both had standing, 408 F. Supp. at 893-97, but it lacked the benefit of our en banc decision in *Evans* v. *Lynn*, 537 F.2d 571, 589 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3346 (U.S. Oct. 29, 1976), which is primarily relevant to the claim of the low-income plaintiffs.[12] We find *Evans* to be distinguishable from the instant case and affirm the district court's decision upholding the standing of all appellees.

A. *The City of Hartford*

The standing of the City here is dependent upon a showing both that the City has been injured "in fact" by HUD's approval of the challenged grants and that the interest the City seeks to protect is one "arguably within the zone of interests to be protected . . . by the statute." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-53 (1970); *see Evans* v. *Lynn*, *supra*, 537 F.2d at 592. Since the injury in fact test must be met at the threshold, 537 F.2d at 592; *see* K. Davis, *Administrative Law of the Seventies*, § 22.02-1, at 487 (1976), we turn first to its application to the City.

12 The *Evans* plaintiffs were low-income persons, and thus, in view of the importance of a case's particular facts in resolving standing issues, *see The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 189 & n.7 (1975), *Evans* has little direct relevance to the question of the City's standing. The district court in *Evans*, in denying standing, expressly stated that a city "would be in a peculiarly appropriate position" for standing in a case of this sort, *Evans* v. *Lynn*, 376 F. Supp. 327, 333 (S.D.N.Y. 1974) (dictum), *aff'd*, 537 F.2d 571, 589 (2d Cir. 1976) (en banc), a proposition with which Chief Judge Kaufman has concurred, 537 F.2d at 611 n.10 (dissenting opinion). Of course, as the following discussion makes evident, *Evans* does provide some general guideposts for our decision with regard to the City's standing.

The district court found that Hartford had been injured by HUD's approval of the grants because, if the grants had been disapproved, the amounts allocated for them would have been reallocated, pursuant to 42 U.S.C. § 5306(e) (Supp. V 1975), to other Connecticut "metropolitan areas" (defined in *id.* § 5302(a)(3) to mean "standard metropolitan statistical areas [SMSAs] as established by the Office of Management and Budget"), among which Hartford would have had a priority position. 408 F. Supp. at 894-95. Appellants argue that, under the statute as modified by HUD regulations, 24 C.F.R. § 570.409(f)(1) (1976), Hartford's position is no better than that of all other towns—we would add, except those with disapproved applications—in the Hartford SMSA. But this demonstrates at most that Hartford's financial stake may not be as large as the sum of all the grants involved in this litigation; it is a long way from proving that Hartford lacks a stake altogether. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) (plaintiff showing "distinct and palpable injury to himself" has standing, even if large group shares the injury); K. Davis, *supra*, § 22.02-10, at 507 ("The line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury."). Appellant's argument, moreover, does not recognize that HUD is unlikely to reallocate funds to localities that did not apply originally for community development funds in 1975; with these localities and the seven towns enjoined below eliminated from the reallocation pool, only Hartford and two other towns in the SMSA would remain eligible.

Appellants further argue that reallocation funds will be distributed only to applicants with "urgent needs," citing 24 C.F.R. § 570.401(b) (1976) (defining "urgent needs") and *id.* § 570.409(d), (f) (establishing criteria and priori-

ties for reallocation), and that Hartford has shown no such needs. There is no indication, however, that Hartford —a city with a high concentration of lower income and unemployed persons and welfare recipients, *see* 408 F. Supp. at 893-94 n.14, and thus likely to have some of the financial resources problems to which the "urgent needs" definition is addressed, *see* 24 C.F.R. § 570.401(b) (1976)—will not be able to make the requisite showing when it applies to HUD for reallocation funds, as it has indicated its intention to do, *see City of Hartford* v. *Hills*, 408 F. Supp. 879, 885-86 (D. Conn. 1975) (decision granting preliminary injunction). Appellants' argument essentially would require a city to present its reallocation application to the district court, rather than to HUD, before the court makes the decision that releases funds to be reallocated. Such a requirement would be at least wasteful of resources, since the court could decide that HUD had correctly approved challenged grants, and in any event would require a city to make a far more detailed showing of injury than any previous case has required, *see Warth* v. *Seldin*, *supra*, 422 U.S. at 504 (plaintiffs need only "allege" facts from which it can "reasonably . . . be inferred that . . . there is a substantial probability" of injury). The strong likelihood that Hartford will receive reallocated funds, while not an absolute certainty, is therefore sufficient to establish that Hartford will "benefit in a tangible way from the courts' intervention." *Id.* at 508; *cf. Evans* v. *Lynn*, *supra*, 537 F.2d at 595 (no injury in fact shown when plaintiffs "claim[ed] only that, had the grants not been approved, the monies *could conceivably* have gone to some other, as yet *totally imaginary* project . . . which *might* have" benefited plaintiffs (emphasis in original)).

There is a second, less quantifiable way in which the City has been injured by HUD's approval of the grants. The

district court found that "[t]he housing situation in Hartford is bleak," referring especially to the high concentration of subsidized, low-rent housing in the City relative to the greater Hartford region and to the overcrowding caused by a housing shortage in the City. 408 F. Supp. at 893-94 n.14. The elimination or amelioration of precisely these sorts of problems is an explicit goal of the Act: 42 U.S.C. § 5301(c) (Supp. V 1975), quoted in full at note 5 *supra*, declares that the grants authorized are for the support of activities with such objectives as "the elimination of slums and blight" and "conditions . . . detrimental to health, safety, and public welfare," and, most importantly for present purposes,

> the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income . . . .

See also id. § 5301(a)(1) (declaration of Congress that urban problems arise from, *inter alia*, "the concentration of persons of lower income in central cities"). This spatial deconcentration objective, the district court found, cannot be met unless an estimate is made of the number of lower income persons "expected to reside" in the community. 408 F. Supp. at 901-02. The Act's legislative history also suggests a close relationship between spatial deconcentration and the "expected to reside" figure. *See* H.R. Rep. No. 93-1114, *supra*, at 3, 6-7. It follows that, when the Secretary approved applications without these estimates, she was substantially lessening the probability that the towns would use the funds received to promote spatial deconcentration and related objectives. Since Hartford would have been the direct beneficiary of spatial deconcentration ef-

forts by its suburbs—to take a concrete example, the City's welfare and housing subsidy outlays would be decreased if large numbers of lower income persons moved to the suburbs—the City was plainly injured by the Secretary's approval of grant applications lacking "expected to reside" figures.[13]

In addition to establishing injury in fact, we take it that Hartford must show that the interest it seeks to protect is "arguably within the zone of interests to be protected . . . by the statute." *Association of Data Processing Service Organizations* v. *Camp, supra*, 397 U.S. at 153.[14] The stat-

13 The City's claim of injury in this respect is quite different from the injury allegedly suffered by a city's taxpayers in *Warth* v. *Seldin*, 422 U.S. 490 (1975). The taxpayers asserted that the exclusionary zoning policies of a suburb forced the city to provide more public housing, which in turn increased the tax burden on the taxpayer plaintiffs. The *Warth* Court held they lacked standing on alternative grounds: first, because their injury resulted, not from the challenged zoning policies, but from decisions to build public housing on the part of city officials; and, second, even assuming injury, because plaintiffs were not asserting any personal right to be free of the suburb's adverse zoning policies, but were asserting rights of third parties. 422 U.S. at 508-10.

By contrast, Hartford's injury here stems from a decision, not by its own officials, but by the Secretary of HUD, an injury over which Hartford had no control. *Cf. The Supreme Court, 1974 Term, supra*, 89 Harv. L. Rev. at 192 (distinguishing injury in *Warth* from one resulting from "inexorable economic forces"). In view of the Act's spatial deconcentration objective, "the line of causation," 422 U.S. at 509, between the Secretary's decision and Hartford's injury is a direct one. Moreover, as discussed in the text *infra*, Hartford is asserting a right of its own, one falling within the zone of interests protected by the statute.

14 Professor Davis has cogently argued that the "zone of interests" test "is more verbiage than reality." K. Davis, *Administrative Law of the Seventies* § 22.00, at 486 (1976). He summarizes his reasons for this statement as follows:

> [T]he test is contrary to the APA, the Supreme Court itself has not followed it, the test seems unsatisfactory, only two cases have denied standing on the basis of the test to one who is injured in fact, and all federal courts have generally found ways to escape from applying it.

Id. § 22.02-11, at 515.

ute here, like the one in *Data Processing*, "do[es] not in terms protect a specified group. But [its] general policy is apparent . . . ." *Id.* at 157. The objectives quoted in the preceding paragraph indicate a concern about persons of low and moderate income, but, contrary to appellants' suggestion, these individuals as individuals are not the only concern of the Act. "The primary objective of [Title I] is the development of viable urban communities . . . ." 42 U.S.C. § 5301(c) (Supp. V 1975). In the list of the purposes for which grants are to be awarded, one finds repeated references to this theme, expressed in terms of "the welfare of the community," improvement of . . . community services," "sound community development," and "the revitalization of . . . neighborhoods." *Id.* § 5301(c)(1), (4), (6); *see* note 5 *supra*. As the legal entity responsible for representation of the community as a community, Hartford plainly has an interest that falls within the zone of interests protected by the Act. We agree with the district court's conclusion: "[T]here can be no doubt that the statute was intended to ameliorate the problems facing the City of Hartford." 408 F. Supp. at 894. Thus, contrary to appellants' suggestion, Hartford is not suing on behalf of its citizens as *parens patriae*, but is instead seeking to vindicate interests of its own, which also happen to be, to some extent, congruent with the interests of individual city residents. *See California* v. *Automobile Manufacturers Association (In re Multidistrict Vehicle Air Pollution M.D.L. No. 31)*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

B. *The Low-Income Plaintiffs*

Like the City, the individual plaintiffs—low-income Hartford residents living in substandard housing, according to affidavits accepted by the district court, 408 F. Supp. at

895 & n.18—must meet both the injury in fact and zone of interests tests in order to have standing to sue. The latter test is easily met here, since the 1974 Act was intended, and the grant funds must be used, to benefit principally "persons of low and moderate income," a phrase repeated throughout 42 U.S.C. § 5301(c) (Supp. V 1975), *see* note 5 *supra*. Moreover, the specific statutory requirement at issue here, the HAP requirement, involves an assessment of, and planning for, "the needs of lower-income persons," both residing in and "expected to reside" in the locality. 42 U.S.C. § 5304(a)(4) (Supp. V 1975); *see* note 6 *supra*. *See also* 42 U.S.C. § 5304(b)(2) (Supp. V 1975) (grant applicant must certify that its program will "give maximum feasible priority to activities which will benefit low- or moderate-income families"). It seems clear that Title I's "zone of interests" encompasses the interests of low-income residents of a central city.

The more difficult issue is whether the individual plaintiffs have been injured in fact by the Secretary's approval of appellants' grant applications. The absence of such injury led to findings that low-income plaintiffs lacked standing in *Warth* v. *Seldin*, *supra*, and *Evans* v. *Lynn*, *supra*. Because the facts of both cases were quite different from the facts of the instant case, however, neither is controlling here. In *Warth* the low-income plaintiffs alleged that they had been excluded from a town's housing market by virtue of the town's "exclusionary" zoning ordinance, which they claimed was constitutionally defective. The Supreme Court ruled that the plaintiffs had failed to show that they "personally would benefit in a tangible way from the courts' intervention," 422 U.S. at 508, in large part because "their inability to reside in [the town] is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts," *id.* at 506. Plaintiffs

here are asserting a specific violation of a statute, not a generalized claim that a law is unconstitutional, a factor of substantial importance in view of the *Warth* Court's recognition that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . . .'" *Id.* at 500, *quoting Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). As discussed above, the statute at issue here was designed to protect persons in the plaintiffs' situation, and the approval of applications lacking legitimate "expected to reside" figures in the HAPs appears to have directly injured the plaintiffs, since the HAPs were intended to lead to greater low-income housing opportunities on a deconcentrated, regional basis, *see Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4486-87 n.21 (U.S. Apr. 20, 1976). The district court's intervention, moreover, should be of tangible benefit to the plaintiffs, because it is likely to lead to a reallocation of funds to Hartford, *see supra*, which will be required to use the funds for the benefit of persons of low and moderate income, in accordance with the purposes of the Act.

Evans v. *Lynn* is also distinguishable. Although the case has some superficial similarity to the instant case, in that it was an attempt to enjoin HUD's award of federal grant funds on statutory grounds, the en banc majority held that the plaintiffs there failed to demonstrate that they had been injured by the grant awards or that court intervention would be of benefit to them. *See* 537 F.2d at 595. Beyond that, as Judge Mansfield pointed out in his concurring opinion, if the awards to the New York town in *Evans* had been enjoined, "HUD would presumably [have been] free to use the money to aid construction of sewers and parks in San Francisco." *Id.* at 598. HUD does not have any such freedom in the instant case; the statute gives reallo-

cation priority to "metropolitan area[s] in the same state," 42 U.S.C. § 5306(e) (Supp. V 1975), and HUD's own regulations give priority "to the same metropolitan area," 24 C.F.R. § 570.409(f)(1)(i) (1976). While "[t]he most" the *Evans* plaintiffs could expect was "the satisfaction that federal funds will not be misused," 537 F.2d at 598 (Mansfield, *J.*, concurring), plaintiffs here can expect concrete benefits resulting from both reallocation of community development funds and increased attention to the low-income housing improvement and spatial deconcentration objectives of the Act.[15]

III. The Alleged Violations of the Act

In considering the substance of plaintiffs' allegations that the Housing and Community Development Act was violated by HUD's approval of the challenged grants, we will examine the claim as to East Hartford separately from that as to West Hartford and Glastonbury, because, as indicated *supra*, the latter two towns submitted "expected to

15 The dissent, relying on *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973), downplays the congressional emphasis on the "expected to reside" portion of the statute, note 6 *supra*, which is a prerequisite to approval by HUD of a grant application. *See* note 5 of dissenting opinion. But *Linda R. S.* v. *Richard D.* arose "in the unique context of a challenge to a criminal statute," 410 U.S. at 617, and has no relevance to the bearing of "legislative expectations" on standing determinations. The *Linda R. S.* Court expressly distinguished the case before it from a case like the instant one, in which standing derives from the invasion of a statutorily-protected interest. *Id.* at 617 & n.3.

The dissent also refers to *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 44 U.S.L.W. 4724 (U.S. June 1, 1976), using it for the proposition that Hartford bears the burden of proof on the issue of standing. We think that burden met. *Simon* is further cited for the propositions that the injury must be traceable to the challenged actions of the defendants and that the court's remedy must serve to prevent the alleged harm. These accepted propositions can be applied, however, only in the context of the Act of Congress with which this case is concerned; in that context, as our opinion seeks to demonstrate, both requirements have been more than satisfied.

reside" figures of zero on their HAPs, whereas East Hartford submitted an actual number (131).

A. *West Hartford and Glastonbury*

In submitting grant applications with zero "expected to reside" figures, the two towns were following the option given to them by HUD in the May, 1975, memorandum. The district court held that this option constituted an invalid waiver of a crucial portion of the 1974 Act, so that the appellants in selecting the option, and HUD in approving the grants, all acted contrary to the Act. 408 F. Supp. at 902. HUD now appears to concur in this holding; its amicus brief explicitly declines even partially to contest the district court's conclusion in this regard and assures us that HUD has modified its regulations to bar zero figures submitted because of an alleged unavailability of data. Brief for Secretary of Housing and Urban Development as Amicus Curiae at 16-18.

We agree with the district court and with the HUD amicus brief. The Act itself could not be more clear: no grant may be made unless the applicant submits an application with six elements, one of which is the housing assistance plan, 42 U.S.C. § 5304(a) (Supp. V 1975); the plan must "accurately" assess the housing needs of low-income persons, "residing in or expected to reside in the community," *id.* § 5304(a)(4)(A). *See* note 6 *supra*. Were this the only statutory statement relating to the grant application, it would probably enable us to find that HUD's memorandum improperly authorized a waiver, for the simple reason that, absent some overriding exigency, an administrative agency may not waive an express statutory requirement. *Cf. Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974) (agency's decisions must be consistent with governing legislation); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965) (courts must prevent "the unauthorized

assumption by an agency of major policy decisions properly made by Congress"); *Marsano* v. *Laird*, 412 F.2d 65, 69 (2d Cir. 1969) ("an express statutory right cannot be impaired by administrative action").

The Act does give further guidance, however. In the subsection following the application requirements, it allows the Secretary, in certain circumstances, to waive, or accept the applicant's certification as to, five of the six requirements. 42 U.S.C. § 5304(b)(3), (4) (Supp. V 1975). The only requirement not listed is that for the HAP. The conclusion is virtually inescapable that the Secretary lacked discretion to waive the HAP requirement. *See* 408 F. Supp. at 901; text at and notes 7-10 *supra*.

It is true that, as appellants argue, waiver of submission of the "expected to reside" figure is not waiver of the entire HAP requirement. A reading of the whole statute, however, makes it evident that the HAP's value is substantially undermined by omission of this figure. If an applicant makes no effort to predict the number of lower income persons it expects to reside within its boundaries in the near future, it is difficult to see how the applicant can "specif[y] a realistic annual goal" for assisted housing or indicate with any reliability where the proposed housing will be located, both of which it must do in order to complete the HAP. 42 U.S.C. § 5304(a)(4)(B), (C) (Supp. V 1975); *see* note 6 *supra*. In the legislative history of the Act, Congress "emphasize[d]" the importance of communities, "in assessing their housing needs, look[ing] beyond the needs of their residents to those who can be expected to reside in the community as well." H.R. Rep. No. 93-1114, *supra*, at 7. *See also* 408 F. Supp. at 901 ("the 'expected to reside' figure is the keystone to the *spatial deconcentration objective* of the 1974 Act" (emphasis in original)). Because of the central role of the "expected to reside"

estimate, we think eminently sound Judge Blumenfeld's conclusion that a waiver of this requirement is in effect a waiver of the entire HAP. *See id.* at 901-02.

Appellants argue in the alternative that the zero figures can be considered legitimate, because the data necessary to make accurate "expected to reside" estimates was not available. The Secretary was thus forced by practical exigencies, they contend, to "defer" this requirement. We believe this argument entirely misunderstands the meaning of a statutory directive. When Congress directs that something be done, it should be done, even if the data base is far from perfect. *Cf. Adams* v. *Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc) (per curiam) (lack of agency experience in area does not "justif[y] a failure to comply with a Congressional mandate"); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 592-95 (D.C. Cir. 1971) (agency must take action even if not convinced "beyond a doubt" as to proper course); L. Tribe, *Channeling Technology Through Law* 33 (1973) (technology assessment frequently amounts to nothing more than "reconciling highly imprecise professional hunches"). Congress was presumably aware of the data collection problems localities might face, *see* H.R. Rep. No. 93-1114, *supra*, at 7, but it apparently preferred an administrative decision based on incomplete data to no decision at all. It is clear that a substantial amount of data was available to the towns; the very HUD memorandum that gave them the zero figure option also listed a variety of data sources from which a reasonable figure could be calculated. Educated guesses by the towns as to how many low-income persons might be expected to reside therein would surely have been better than the sham zero figures in promoting the rational community planning with which Congress was concerned.

B. *East Hartford*

The Town of East Hartford did submit an "expected to reside" figure, but the district court concluded that HUD's review of this figure's validity was so seriously inadequate as to constitute an abuse of discretion. The figure submitted was based upon a projection of the waiting list of the East Hartford Housing Authority, and HUD failed to verify in any way whether this figure was a valid one. While HUD sought to justify this failure by asserting an absence of data, HUD's own regulations, application instructions, and memoranda suggested sources of data that were "generally available," 42 U.S.C. § 5304(c)(1) (Supp. V 1975), and that should have been used by HUD to verify the accuracy of East Hartford's figure. Thus, the district court concluded, "HUD was doubly at fault—it did not obtain the generally available information required for a proper review, and it acted upon the basis of inadequate information." 408 F. Supp. at 903.

As the district court recognized, *id.* at 903 & n.57, the general proposition that review of agency discretion is narrowly circumscribed, *see Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), is particularly compelling in the case of review of approval of community development grants, since the statute's application and approval procedures, as discussed *supra*, establish a "presumption of approval." *See also Ulster County Community Action Committee, Inc.* v. *Koenig*, 402 F. Supp. 986, 990 (S.D.N.Y. 1975); Fishman, *supra*, 7 Urban Law. at 211. As the Supreme Court stated in *Overton Park*, however, such a presumption does not "shield [the Secretary's] action from a thorough, probing, in-depth review." 401 U.S. at 415; *see Schicke* v. *Romney*, 474 F.2d 309, 315 (2d Cir. 1973). This court has plainly held, moreover, that "it is 'arbitrary or capricious' for an agency not to take into

account all relevant factors in making its determination." *Hanly* v. *Mitchell*, 460 F.2d 640, 648 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972). At the very least, "ascertainable standards" are required. *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968).

East Hartford argues on appeal that its "expected to reside" figure of 131 was not proven wrong by the district court. This argument misunderstands the role of the courts in reviewing agency action. The district court did not have an obligation, and perhaps lacked the authority, to assess the correctness of East Hartford's figure. Its role was both more limited and more vital to the proper functioning of the administrative process: to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416.

It seems clear that HUD made a major "error of judgment" in not independently investigating East Hartford's figure. A suburban town's attempt to ascertain the housing needs of future residents from a waiting list for a limited supply of public housing units is certainly sufficiently questionable to require some further verification. The court below found that data was "generally available" from which such a verification could have been made. Essentially for the reasons stated by the district court, 408 F. Supp. at 902-07, we conclude that the Secretary acted arbitrarily and capriciously in approving East Hartford's grant application.[16]

16 We recognize and appreciate Professor Davis's concern that review on the basis of "whether there has been a clear error of judgment," *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), comes too close to judicial substitution of judgment. K. Davis, *supra* note 14, §§ 29.00, 29.01-5. It is equivalent, Professor Davis urges, to the "clearly erroneous" test, which in turn involves broader review than even the "substantial evidence" test, *id.* § 29.01-5, at 666, which

IV. The Remedy

The injunction issued by the district court is challenged on the ground that it was directed against appellant towns, rather than against HUD. In view of the fact that HUD had sent letters of credit to the towns by the time the preliminary injunction was issued, so that they were free to obtain grant funds from the Treasury, *see City of Hartford* v. *Hills, supra,* 408 F. Supp. at 882 (opinion on motion for preliminary injunction), the court's order restraining the towns (who were defendants) from drawing out or spending these funds appears to be the most direct means of preventing expenditure of unlawfully authorized monies. The injunction provided, moreover, that it could "be lifted upon the filing with the court of . . . a new approval [of the towns' grant applications]." 408 F. Supp. at 907. Such an injunction, combining a practical means to a desired end with a mechanism to take account of future developments, is consistent with the broad, flexible nature of the federal courts' equitable powers. *See Hills* v. *Gautreaux, supra,* 44 U.S.L.W. at 4484, and authorities cited therein.

The suggestion is made that the case may be moot as to West Hartford and Glastonbury because they have filed new applications, the 75-day period has run, and they are entitled to funds under the new applications. *See* 42 U.S.C. § 5304(f) (Supp. V 1975). But the injunction relates only to funds granted prior to the time of its entry and is

similarly affords "a considerably more generous judicial review than the 'arbitrary and capricious' test available in the traditional injunctive suit," *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 143 (1967). But it is no substitution of judgment to say that approval of a block grant under the Act must depend upon agency consideration of *all* the data that the agency itself thinks relevant to the statutory requirement of an "expected to reside" estimate. *See* K. Davis, *supra* § 29.01-5, at 666 (approving *Overton Park's* "consideration of relevant factors" test).

not mooted by any later grants pursuant to later submissions. The injunction may be lifted by filing with the district court new HUD approvals of applications with adequate "expected to reside" figures.

Judgment affirmed.

Meskill, *Circuit Judge* (dissenting):

I respectfully dissent, for I cannot agree that the plaintiffs have standing to maintain this action. However, before turning to the issue of standing, I should like to comment upon the unusual procedural posture in which East Hartford, West Hartford and Glastonbury ("appellants") now find themselves. The plaintiffs' complaint originally named HUD, its Secretary, its Regional Administrator and its District Director as the only defendants (the "federal defendants"). The local defendants (Farmington, Windsor Locks, Vernon, Enfield and the appellants) were joined as parties by the federal defendants. At the district court level, the defense of this action was dominated by the federal defendants, upon whom the local defendants relied to carry the burden of this litigation. This approach was encouraged by the district judge, who, in order to simplify the proceedings, asked the local defendants to "tag along and support the federal defendant [sic] and take the same position." On January 28, 1976, the district court issued its decision enjoining the local defendants from spending the funds granted under the Block Grant Program. The federal defendants decided not to appeal from that decision because (1) HUD finds the *result* to be consistent with its present practices, (2) the district court's opinion can be read in a manner consistent with HUD's interpretation of its duties under the Act, and (3) the injunction only applies to the seven local defendants. Brief For The Secretary of

Housing and Urban Development Amicus Curiae at 3. With a few minor exceptions, the brief filed by HUD is in general agreement with the decision of the district court and the position taken by the plaintiffs. The issue of standing is not discussed, for it is outside the scope of the brief. *Id.* at 4.

Of the seven local defendants thus left holding the bag, three have appealed. All have now learned the hard way that it is not always a good idea to "tag along" with and "take the same position" as a co-defendant. The three appellants are now represented by counsel who did not participate in any of the proceedings below.

It is relatively easy to see why all of this occurred. HUD, of course has a substantial interest in the manner in which the courts construe the 1974 Act, and so it would naturally want to play a dominant role in any proceeding concerning that Act. The local defendants who were joined as such by HUD would naturally want to rely heavily upon the latter's expertise. This is particularly true where, as here, the district court asks them to do so in order to simplify the proceedings. As a result of what has occurred, however, much has been lost in terms of the sharpening of the presentation of issues upon which the courts rely so heavily. It is not my intention to disparage counsel's presentation, for counsel have, in my judgment, done a fine job in that regard. I wish only to point out that it could have been improved if greater foresight had been shown at the district court level. District courts and private counsel can, and should, be alert to the potentially conflicting interests of private litigants and governmental agencies, but governmental agencies bear a special responsibility in this respect. Because of their expertise in their respective fields, and because of the frequency with which they are likely to encounter problems such as that which has arisen here, governmental agencies are in a superior position to foresee

and avert those problems. It is to be hoped that in the future agencies such as HUD will make some effort to assure that their co-defendants are made aware of possible conflicts of interest so that other litigants will not find themselves in appellants' position.

Turning now to the standing issues presented, I believe a brief restatement of the facts is in order. On April 15, 1976, the Hartford Area Office of the Department of Housing and Urban Development received an application for Community Development Block Grant Assistance filed by the City of Hartford pursuant to the Housing and Community Development Act of 1974. By letter dated June 24, 1975, HUD approved a grant to Hartford in the amount of $10,025,000. Hartford executed a Grant Agreement on July 30, 1975.

The towns of East Hartford, West Hartford and Glastonbury followed much the same procedure in applying for Block Grant Assistance, and they were granted $440,000, $999,000 and $910,000, respectively. Hartford and two of its low-income residents now challenge those grants on the ground that the applications submitted by the towns fail to satisfy one of the requirements of the Act.[1] The majority holds that the plaintiffs have standing to make such a challenge. I cannot agree.

The majority holds that Hartford has satisfied the "injury in fact" test established in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970), because (1) if the grants to the towns are disapproved, there is a "strong likelihood," *ante*, at ——, that

1 Of the eight municipal governments, including the City of Hartford, who were parties to this action, only one, East Hartford, made any attempt to satisfy the requirement of 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). Thus, Hartford and six of the defendant towns entered zero as the number of low-income persons "expected to reside" within their borders. East Hartford entered 135. HUD subsequently reduced this figure to 131.

Hartford will receive reallocated funds under 42 U.S.C. § 5306(c) (Supp. V 1975),[2] and (2) HUD's approval of applications that failed to comply with the statutory requirements "substantially lessen[ed] the probability," *ante*, at ——, that Hartford would benefit from the "spatial deconcentration" objective of the Act.

Assuming, arguendo, that a potential claim to a fund that will not even exist unless plaintiff is successful on the merits can ever satisfy the injury-in-fact test—which appears to require a present injury in addition to a prospective benefit—it is clear that in this case there is not the slightest chance that Hartford will ever receive reallocated funds as a result of this lawsuit. While it may be true that Hartford would have a priority position in applying for reallocated funds, that priority will mean little if there are no funds to reallocate. Despite the indications to the contrary in the majority opinion, Hartford, as the party who asks the Court to assume jurisdiction, bears the burden of proof on the issue of standing, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 44 U.S.L.W. 4724, 4730 (U.S. June 1, 1976), and although Hartford may have proved that it would have a priority position in applying for reallocated funds, it has failed to prove that the intervention of the federal courts will result in the availability of funds for reallocation. The wrong of which Hartford

2 The complaint does not mention the possibility of obtaining reallocated funds as a prospective benefit of this lawsuit. To find that the plaintiffs have alleged a stake in the outcome sufficient to confer standing on the basis of a prospective benefit that is not even mentioned in the complaint is to grant far greater pleading latitude than prior cases indicate is appropriate. *See Simon* v. *Eastern Kentucky Welfare Rights Organization*, 44 U.S.L.W. 4724, 4728-30 (U.S. June 1, 1976); *Warth* v. *Seldin*, 422 U.S. 490, 501-02 (1975); *United States* v. *SCRAP*, 412 U.S. 669, 688-89 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 734-36 (1972); *Evans* v. *Lynn*, 537 F.2d 571, 592 (2d Cir. 1976) (*en banc*). *See also* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3531, at 17-18 (Supp. 1976).

complains is HUD's approval of the defendant towns' allegedly defective applications. If Hartford is correct that the applications were defective, and that HUD abused its discretion in approving them, Hartford would not be entitled to relief preventing the defendant towns from ever receiving their grants. Hartford would be entitled only to an injunction pending the submission of acceptable applications—precisely what it sought, and precisely what the district court granted. Such an injunction would result in the availability of funds for reallocation only if the towns forfeited their grants by failing to submit acceptable applications. West Hartford and Glastonbury have already submitted new applications, thereby negating any possible inference that they intend to forfeit their grants —in addition to creating a substantial mootness problem— and there is not the slightest indication that East Hartford has any intention of forfeiting its $440,000 grant by failing to do likewise. It is sheer fantasy to suppose that Hartford will ever receive reallocated funds as a result of the intervention of the federal courts. In my view, Hartford's asserted interest in reallocated funds is even more speculative than the interest found to be not judicially cognizable in *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), and, accordingly, I would hold that it is insufficient to confer standing upon Hartford.[3]

The majority also finds standing on the basis of "a second, less quantifiable," injury suffered by Hartford, *ante*, at ——. That injury is the "bleak" housing situation that exists in Hartford. That situation will be improved, we are told, if the suburbs are required to include accurate "expected to reside" figures in their applications for Block Grants. This injury is insufficient to confer

3 To the extent that the low-income plaintiffs' claim of standing rests upon their assertion of an interest in reallocated funds, *see ante*, at ——, it too must fail.

standing for three reasons. First, it cannot fairly be said that the housing situation in Hartford is a result of, or can be traced to, the challenged action of the defendants. *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 44 U.S.L.W. at 4729. Second, the possibility that the inclusion of accurate "expected to reside" figures will result in the betterment of the housing condition in Hartford is at least as remote and speculative as the possibility in *Linda R.S.* v. *Richard D., supra,* that the prosecution of an unwed father for failing to support his child will result in the payment of support. Third, and more important, Hartford may not properly assert an interest in improving its bleak housing situation in an action against the federal government. The doctrine of *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923), places strict limits on the power of states to represent their citizens in actions against the federal government. *See, e.g., Com. of Pa., by Shapp* v. *Kleppe,* 533 F.2d 668 (D.C. Cir.), *cert. denied,* 45 U.S.L.W. 3396 (U.S. Nov. 30, 1976). The power of a political subdivision of a state is even more rigidly circumscribed. As the majority recognizes, *ante,* at ——, a city cannot sue as *parens patriae,* but is limited to the vindication of such of its own proprietary rights as might be congruent with the interests of its residents. *California* v. *Auto. Mfrs. Ass'n, Inc.* (*In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*), 481 F.2d 122, 131 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973). Hartford's assertion of an interest in improving its bleak housing situation is nothing more than an attempt to vindicate a general interest in the social and economic well-being of the citizenry. Even a state would encounter serious difficulties in asserting such an interest against the federal government, and it can hardly be said that this is the sort of proprietary interest which Hartford may assert.

Merely because Hartford may not assert the rights of its citizenry in a representative capacity does not mean that individual citizens may not assert their own rights. Accordingly, I next turn to the claims of the low-income plaintiffs to determine whether they have alleged a stake in the outcome sufficient to confer standing.

The individual plaintiffs in this case are low-income residents of Hartford who live in substandard housing and who have sought, unsuccessfully, to secure affordable housing in the suburbs. There is, of course, no question that an individual who is, effectively, trapped in a slum suffers a serious, present and continuing injury. Abstract injury alone, however, is insufficient to confer standing. *Linda R.S.* v. *Richard D., supra,* 410 U.S. at 618. The injury alleged must fairly be traceable to the challenged action of the defendant, and the desired exercise of the Court's remediable powers must in some perceptible way serve to remove the harm. *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 44 U.S.L.W. at 4729-30. The majority is correct in holding that the facts of this case are distinguishable from those of *Warth* and *Evans.*[4] However, the distinctions are not great enough, in my judgment, to justify the conclusion reached by the majority.

To begin with, the bleak housing siltuation in Hartford is not the product of HUD's failure to require the defendant towns to include "expected to reside" figures in their applications for Block Grants under the 1974 Act. The housing situation in Hartford was bleak long before 1974. Nor are the specific conditions of which the plaintiffs complain a product of HUD's alleged abuse of discretion. Plaintiff Jordan had been living at her present address for two years as of June 30, 1975, and therefore her plight antedates the Act by roughly one year. Plaintiff Mauldin's

4 *Warth* v. *Seldin,* 422 U.S. 490 (1975); *Evans* v. *Lynn,* 537 F.2d 571 (2d Cir. 1976) (*en banc*).

position is no stronger. She moved to Hartford approximately one month before David Meeker wrote his memorandum "waiving" the requirement of 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). Of course, Mrs. Mauldin's plight has nothing to do with acts of Congress or HUD or David Mecker's memorandum. Her plight is the direct result of the fact that her husband became incapacitated. That incapacitation led to his unemployment, which, in turn, led to the loss, through foreclosure, of the family home in the suburban town of Bloomfield.

As indicated above, the injury suffered by the individual plaintiffs is a continuing one. However, because the basic injury of which the plaintiffs complain antedated the action they challenge, they would have standing only if they can allege that their injury has been, or will in fact be, perceptibly aggravated by the challenged action. The plaintiffs have not made, and, indeed, could not make, such an allegation. HUD's failure to require the defendant towns to include "expected to reside" figures in their applications for Block Grants did not make the plaintiffs' situation worse, but merely left it the same. The "waiver" of the requirement by HUD did not have a negative effect. It merely failed to produce the hoped-for positive effect. Thus, the low-income plaintiffs' claim of standing, like that of the City of Hartford, depends not upon a present injury that has been caused by HUD's allegedly unlawful action, but upon a prospective benefit that they hope will accrue if the federal courts intervene and require the inclusion of accurate "expected to reside" figures. The standing *vel non* of plaintiffs with such claims depends upon whether there is a direct nexus between the vindication of their interests and the relief they seek, or whether the prospect that their lot will be improved by the desired exercise of the Court's remedial powers is merely speculative. *See Linda R.S.* v. *Richard D., supra,* 410 U.S. at

618-19. The most recent applications of these standards by the Supreme Court place formidable barriers in the way of actions such as the one now before this Court. *See, e.g., Simon* v. *Eastern Kentucky Welfare Rights Organization, supra.* The plaintiffs have not, in my view, successfully cleared those barriers. It is naive to imagine that plaintiffs' lot will be perceptibly improved merely by coercing the defendant towns into including accurate "expected to reside" figures in their Block Grant applications. The "expected to reside" figure lacks the magical power that would be required to produce such a result. The causes of the housing problems that plague the cities of this Nation are legion. Suggested cures for those problems are complex and equally numerous. The "expected to reside" figure is a new and relatively small part of the federal government's attack on urban housing problems. Its impact on those problems is unknown and unmeasurable. The prospect that it will have the desired impact or that its impact will be perceptible is gossamery.[5] Thus, the complaint does not demonstrate, and the plaintiffs could not possibly show, a substantial likelihood that victory in this suit would result in their securing the adequate, low-cost housing that they desire. *See, Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 44 U.S.L.W. at 4730. Accordingly, I would hold that the low-income plaintiffs, like the City of Hartford, lack standing to maintain this action.

The judgment of the district court should be vacated and the cause remanded with instructions to dismiss the complaint.

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5 It is true, of course, that Congress expects, or at least hopes, that the "expected to reside" figure will have some impact. However, legislative expectations are not necessarily dispositive in determining whether those expectations are speculative. *See Linda R.S.* v. *Richard D., supra.*

Opinion of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL No. H-75-258

CITY OF HARTFORD, ET AL.

v.

CARLA A. HILLS, ET AL.

MEMORANDUM OF DECISION

I.

This case is the culmination of a confrontation between the City of Hartford and seven of its suburban towns. At issue is the propriety of the decision by the United States Department of Housing and Urban Development (HUD) to approve federal community development grants to these towns. The plaintiffs contend that this approval was improper, because of the emphasis in the applications on non-housing expenditures, and upon local rather than regional needs.[1]

The plaintiffs are the City of Hartford, Connecticut; eight city officials;[2] and two representatives of a class consisting of minority, as well as low and moderate income,

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[1] The funds are available under the Housing and Community Development Act of 1974. Pub. L. No. 93-383; 88 Stat. 633; 42 U.S.C. §§ 5301 *et seq.* (1975 Supp.).

[2] All eight are members of the Hartford Court of Common Council—the city's governing body.

persons now living "in deteriorating, inadequate, or overly-costly housing in the City of Hartford, Connecticut."[3] The plaintiffs seek declaratory and injunctive relief against the seven towns,[4] the Secretary and other officials[5] of the Department of Housing and Urban Development, and the Department itself. The plaintiffs claim that the defendant officials have failed to live up to their obligations under Title I of the Housing and Community Development Act of 1974,[6] Title VIII (Fair Housing) of the Civil Rights Act of 1968,[7] and Title VI of the Civil Rights Act of 1964.[8] They also assert constitutional claims under the civil rights statutes[9] and the fifth amendment.

Specifically, the plaintiffs claim that the federal defendants abused their discretion in that they approved applications for community development funds under the 1974 Act although the statutory review standards mandated that the applications be disapproved. Similarly, they claim that HUD contravened Title VIII of the 1968 Act by failing to "affirmatively administer" the community development program in order to expand low and moderate

[3] Paragraph 11 of the Complaint. These plaintiffs' Motion for Permission to Proceed In Forma Pauperis was granted on August 11, 1975.

[4] The seven towns whose grant applications are challenged are: East Hartford, Enfield, Farmington, Glastonbury, Vernon, West Hartford, and Windsor Locks. The towns were ordered joined, as additional defendants, on the motion of the United States Department of Housing and Urban Development.

[5] In addition to the Secretary, both the Regional Administrator and Area Director of HUD are named as defendants. All three are sued only in their official capacities.

[6] Cited in note 1 *supra*.

[7] Pub. L. No. 90-284; 82 Stat. 81; 42 U.S.C. § 3601 *et seq.*

[8] Pub. L. No. 88-352; 78 Stat. 252; 42 U.S.C. § 2000d *et seq.*

[9] 42 U.S.C. §§ 1981, 1982, and 1985.

income housing opportunities in Hartford's suburbs. Finally, they allege that HUD violate Title VI of the 1964 Act by approving these community development grant applications "in the face of a history by these applicant communities of discriminatory housing, zoning, and land use practices. . . ."[10].

A hearing was held on the plaintiffs' motion for a preliminary injunction, and the defendants' motion to dismiss or in the alternative for summary judgment. Shortly thereafter the defendants were preliminarily enjoined from "spending in any fashion" the funds at issue in this case. Later that order was modified to permit the release of urgently needed funds, most of which were expended for housing-related purposes. At the hearing on the modification request all parties agreed that final judgment could be entered on the basis of the record as it had been developed up to that point and as it would be supplemented by several affidavits. All of those affidavits have now been filed, and the case is before me for a decision on the merits.[11]

II.

Jurisdiction is present under 28 U.S.C. § 1331 since the grants which are the subject of this controversy total well over $10,000. Jurisdiction is also present under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *Evans* v. *Lynn*, No. 74-1793 (2d Cir. June 2, 1975) (Gurfein, J.

[10] Paragraph 31 of the Complaint.

[11] The United States has recently filed a Supplemental Motion to Dismiss or in the Alternative for Summary Judgment, based upon newly-proposed HUD regulations. 24 C.F.R. § 570.303; 41 Fed. Reg. 2347 (Jan. 15, 1976). Although these regulations concern the "expected to reside" section of the HAP for future grant applications, they were not, obviously, used in evaluating the grants challenged in this case. Accordingly, I do not consider them in this decision.

concurring), *rehearing en banc granted* August 11, 1975. A class action is not necessary in this case, since full injunctive and/or declaratory relief awarded on behalf of the named plaintiffs will also benefit their class. 3B *Moore's Federal Practice*, § 23.40 (Supp. 1974). Furthermore, the definition of the class is not sufficiently detailed to warrant certification. *Warth* v. *Seldin*, 422 U.S. 490, 494-95 n.5 (1975).

III.

The plaintiffs are faced, at the threshold, with a challenge to their standing to bring this action. The defendants argue that all of the plaintiffs lack standing, and ask that the complaint be dismissed for failure to state a claim upon which relief may be granted. I decline to accept that invitation, because I find that several of the plaintiffs do, in fact, possess standing to bring this action.

The issue of the standing of the City of Hartford has already been addressed twice by this court, and both times I have ruled that the City does have standing to sue.[12] It may be helpful, however, to recount briefly the basis upon which that conclusion was reached.

The Housing and Community Development Act of 1974 speaks directly to the problems confronting our urban areas. The initial clauses of the statute read:

> "(a) The Congress finds and declares that the Nation's cities, towns, and smaller urban communities face critical social, economic, and environmental problems arising in significant measure from—
>
> (1) The growth of population in metropolitan and other urban areas, and the concentration of persons of lower income in central cities; and
>
> (2) inadequate public and private investment and reinvestment in housing and other physical facilities, and related public and social services, resulting in the growth and persistence of urban slums and blight and the marked deterioration of the quality of the urban environment.
>
> "(b) The Congress further finds and declares that the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic, and political entities. . . .
>
> "(c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing, and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."[13]

The plaintiffs have filed a number of affidavits detailing the problems facing the City of Hartford.[14] The figures

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[12] Memorandum of Decision on Plaintiffs' Motion for a Preliminary Injunction, September 30, 1975; and Ruling on Defendants' Motions to Reconsider and to Amend Preliminary Injunction, October 29, 1975. The City participated in the A-95 administrative review process, and may also have "person aggrieved" standing under 5 U.S.C. § 702. In light of my prior decisions, I need not resolve that issue.

[13] 42 U.S.C. § 5301 (1975 Supp.).

[14] The affidavits submitted by the plaintiffs strongly support the view that Hartford is one of the American central cities, suffering from a concentration of lower-income persons, that the Act was designed to benefit. The City's Department of Social Services ad-

(footnote continued on following page)

contained therein have not been challenged by the defendants. Thus, there can be no doubt that the statute was intended to ameliorate the problems facing the City of Hart-

(footnote continued from preceding page)

ministers between 40 and 45 per cent of all town general assistance cases in the entire state, and about 35,000 City residents receive either town general assistance or state public assistance. Plaintiffs' Exhibit 11, Affidavit of Joseph Alleyne, Director of the Department of Social Services, City of Hartford, September 18, 1975. Furthermore, over half of the City's residents either receive such assistance or live exclusively on social security or unemployment benefits. In July 1975, the City's unemployment rate stood at 13.6 per cent. The 1970 Census found that Hartford's population was 35.5 per cent minority, and that percentage has increased since then. The school population now is over 80 per cent minority. Plaintiffs' Exhibit 9, Affidavit of Richard Suisman, Member, Hartford Court of Common Council, September 18, 1975.

The housing situation in Hartford is bleak. There are now 16,000 substandard, deteriorating or dilapidated units in the City. About one-half of the City's families pay over 25 per cent of their annual income for shelter. In addition, most of the subsidized housing in the Greater Hartford Region is already located in the City of Hartford. Hartford has 61 per cent of these units although it has only 24 per cent of the total population of the region. Specifically, 71 per cent of the low-rent public housing, 46 per cent of the moderate-rent public housing, and 59 per cent of the privately-sponsored subsidized housing units are located within the City. And the majority of the subsidized moderate rental public housing units located within the suburbs are for elderly housing. Plaintiffs' Exhibit 10, Second Affidavit of William Slitt, Director of Housing, City of Hartford, September 16, 1975.

The condition of the City of Hartford, described above, stands in marked contrast to that which prevails in its suburban towns, as is demonstrated by a report prepared for HUD by Richard P. Nathan, a Senior Fellow at The Brookings Institution. *The Record of The New Federalism: What It Means For The Nation's Cities*, The Brookings Institution, Washington, D. C., September 30, 1974. Exhibit A to Plaintiffs' Memorandum In Opposition to Motion to Dismiss or in the Alternative for Summary Judgment. This report uses six factors to compare conditions in 58 core cities with those in their suburbs. The six factors considered were: unemployment; population age; educational levels; per capita income; poverty

(footnote continued on following page)

ford. The plaintiffs' allegations, and the statutory language, make it clear that the City falls within the "zone of interests" created by the Act. *Cf. Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970).

(footnote continued from preceding page)

percentage; and housing overcrowding percentage. The disparity between Hartford and its suburbs was the third worst, overall, in the entire nation; only Newark, New Jersey and Cleveland, Ohio ranked worse. The Hartford region had the greatest disparity in the country on the poverty ratio scale—a city/suburb comparison of the relative percentages of families with annual incomes of under 125 per cent of the federal low-income standard for that family size. Hartford was second worst on the limited education ratio scale—the percentage of the population over age 25 with less than a 12th-grade education. It was also second worst on housing overcrowding, defined as occupancy over one person per room. The City was third worst on both the unemployment and per-capita income comparisons. However, it was in the middle-range of American cities in Standard Metropolitan Statistical Areas (SMSA) of over 500,000 population on the dependency ratio scale —the percentage of the population under 18 or over 64 years of age.

These statistics are particularly relevant to the issues raised by this lawsuit. The last factor suggests that there is a pool of working-age persons now living in the City, but the unemployment ratio tells us that the jobs which exist are out in the suburbs. The study also indicates that there is a critical housing shortage in the City, resulting in severe overcrowding. This housing crush could be relieved by a movement to the surrounding towns, perhaps motivated by a search for employment opportunities. This sort of exodus may well have been what Congress anticipated when it established the "expected to reside" category on the Housing Assistance Plan, and emphasized the importance of "planned or existing employment facilities" to the calculations required to estimate this aspect of a town's housing needs for lower-income persons. See Part V *infra*.

The disparities reflected in these figures assume even greater significance when one realizes that Springfield, Massachusetts—another good-sized central city, with its attendant problems, and part of the Hartford SMSA—was included in the "suburban" figures for purposes of this study by The Brookings Institution!

Similarly, the statute itself demonstrates that the second prong of the standing test—the "injury-in-fact" requirement—is met here. The statute explicitly provides for the reallocation of funds from grants which are disapproved, "first, in any metropolitan area in the same State. . . ." 42 U.S.C. § 5306(e) (1975 Supp.). Thus, if the plaintiffs are successful in their effort to overturn HUD's approval of these grant applications, and if the funds at issue are made available for reallocation, Hartford will be eligible to receive them, and will have a strong statutory priority. This priority is strengthened by the current HUD Regulations. As I noted in my decision modifying the preliminary injunction previously entered in this case,[15] one regulation in particular, 24 C.F.R. § 570.409(f)(1)(i); 40 Fed. Reg. 42347, 42349 (September 12, 1975), requires that such reallocation funds be disbursed with *first priority* going to "the same metropolitan area." Thus, the City of Hartford has clearly suffered a judicially cognizable injury, sufficient to confer standing to sue, if the grant applications were approved in a manner contrary to law. It certainly stands to benefit in a tangible way from this court's intervention, thereby meeting the Supreme Court's most recent formulation of the "injury-in-fact" requirement. *Warth* v. *Seldin*, 422 U.S. 490 (1975).

The defendants' challenge to the standing of the city officials and the individual plaintiffs presents other problems. The members of the Court of Common Council sue only in their official capacities. Their claim of standing depends upon their alleged inability to perform their official duties and responsibilities because of the federal government's improper approval of the grant applications.[16] They point out that they have taken an oath to

[15] Ruling on Defendants' Motions, cited at note 12 *supra*.

[16] Plaintiffs' Exhibit 9, Affidavit of Richard Suisman, September 18, 1975, ¶ 32.

uphold the United States Constitution, and that they challenge HUD's approval on constitutional as well as statutory grounds. From this they conclude that they should be recognized as having standing to sue, citing *Board of Education of Central School District No. 1* v. *Allen*, 392 U.S. 236 (1968). However, *Allen* involved constitutional issues, specifically, a constitutional challenge to a state law. The plaintiff officials were torn between their duty to implement the state law and their duty to uphold the federal constitution.[17] Here, by contrast, the city officials are not challenging any allegedly unconstitutional duties placed upon them. Rather, they seek to overturn the actions of the defendant HUD officials, based, in part, on a constitutional challenge. *Allen* does not stand for the proposition that anyone who has once taken, or is currently bound by, an oath to uphold the federal constitution has standing to challenge actions of third parties simply because they are similarly bound. These city officials have no cognizable legal interest in the outcome of this suit. Therefore, the motion to dismiss will be granted with respect to the members of the Court of Common Council of the City of Hartford.

The situation of the two low-income minority plaintiffs is more difficult. The question is whether standing to sue can be fashioned on the basis of these two characteristics. To determine the answer, it is necessary to analyze exactly what is being challenged, and what exactly is the basis of the challenge.

The plaintiffs challenge administrative action: HUD's approval of the grants to the seven suburban towns. They allege that this approval was contrary to the department's responsibilities under a battery of federal statutes, chief among them the Housing and Community Development Act of 1974 and Title VIII, the Fair Housing Title, of the

[17] 392 U.S. at 241 n.5.

1968 Civil Rights Act. As poor persons living in Hartford in substandard housing,[18] they are certainly within the "zone of interests" created by the 1974 Act. The opening section of that Act is replete with the phrase "principally for persons of low or moderate income," emphasizing whom the Act was intended to benefit. And that same section also highlights the key role housing was to play in Congress' goal of preserving viable urban communities. Furthermore, as members of minority groups, plaintiffs are entitled to the protection of the federal civil rights acts.[19]

The defendants argue that the decision in *Warth* v. *Seldin*, 422 U.S. 490 (1975) is dispositive of the standing issue, and requires that the individual plaintiffs also be dismissed for failing to state a claim. But this case is not controlled by *Warth*. There the plaintiffs raised only constitutional challenges to the zoning decisions of local officials. Here statutory claims are also at issue, and, as the Supreme Court noted in *Warth*, "the actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .' "[20] In this Circuit the controlling decision is *Evans* v. *Lynn*, No. 74-1793 (2d Cir. June 2, 1975), *rehearing en banc granted* August 11, 1975. There the plaintiff class consisted of

> "minority residents of Westchester County who reside in racially concentrated areas of the county and

[18] Affidavits of Miriam Jordan and Fannie Mauldin, July 1, 1975.

[19] Indeed, even non-minorities have standing to sue under the broad "person aggrieved" standard Congress selected for suits brought under the 1968 Fair Housing Act. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972).

[20] 422 U.S. at 500, citing *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973).

> are constrained to do so because the failure of federal agencies to perform their affirmative duties permits the maintenance of a growing pattern of racial residential segregation. . . ."

Evans v. *Lynn*, Slip Op. 3885, 3888. They challenged the approval, by HUD and the Bureau of Outdoor Recreation, of federal grant moneys to a sewer district within the Town of New Castle, and to the Town itself.[21] The Court of Appeals, in a 2-1 decision, held that the low-income plaintiffs had stated a judicially cognizable claim sufficient to withstand a motion to dismiss for lack of standing. Judge Oakes, writing for the court, held that the plaintiffs were within the "zone of interests" created by Title VIII, in that they challenged federal agency action as, allegedly, not complying with the "affirmative duty" upon federal agencies to administer their programs in a manner designed to enhance fair housing opportunities. In his concurring opinion, Judge Gurfein held that the plaintiffs had standing under the Administrative Procedure Act,[22] in order "to raise the question of whether the Secretary has failed to make the inquiries" implied by this affirmative duty. *Evans* v. *Lynn*, Slip Op. 3885, 3918.

The grants in this case were approved by HUD. Although the statute sets forth specific standards by which the grants are to be tested, the plaintiffs allege that they were not correctly implemented by HUD.[23] The statute clearly has, as one of its objectives, the spatial deconcentration of lower-income groups, particularly from the cen-

[21] The programs which authorized those grants have since been consolidated into the unified community development program at issue in this case.

[22] 5 U.S.C. § 702.

[23] These standards may be found at 42 U.S.C. § 5304(c) (1975 Supp.).

tral cities. Congress apparently decided that this was part of the solution to the crisis facing our urban communities. These two plaintiffs are among this very group of persons, persons for whom Congress indicated it might be beneficial to relocate outside the central city.[24] Part of the grant application process involves an assessment by each community of its needs, and the development of a plan to meet those needs. If the needs stated in the application are not a true reflection of the community's needs, or if the projects for which the funds are to be spent are not calculated to meet the community's needs, the Secretary is required to disapprove the grant application. The granting process, as disclosed in the administrative record compiled during the review of these seven grant applications,[25] involved a flexible review by HUD. The applications were studied and commented upon by HUD personnel, who evaluated the needs and projects as set forth in the applications. In many instances, more information was requested from applicants, or their responses were invited to HUD's criticisms or suggestions. In several instances the applicant communities responded to comments and criticism from HUD by revising their applications. If approval was improper, the plaintiffs may well have lost the benefits of re-directed priorities by the applicant towns, or, perhaps, the benefits of projects implemented by the City of Hartford with any reallocated funds. Thus, both the "zone of interests" and "injury-in-fact" aspects of standing required by *Warth* are present here. Additionally, as Judge Gurfein noted, the plaintiffs have standing under the APA as persons aggrieved by agency action to permit the court to decide what HUD's obligations are, and whether it has met them.

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[24] 42 U.S.C. § 5301(c)(6) (1975 Supp.).

[25] The administrative records for all seven grant applications have been incorporated into the record.

Similarly, Title VIII itself established an affirmative obligation upon HUD, an obligation which doubtless inures to the benefit of these plaintiffs. The extent of this obligation, and the issue of whether or not it was satisfied in this case, are issues which go to the merits.[26] As Judge Oakes pointed out in *Evans,* "it is enough if a viable claim of non-performance is made." Slip Op. 3885, 3891 n.8. For the reasons stated in his opinion in that case, I agree that the plaintiffs here possess standing to sue under Title VIII. Here, as there, we have plaintiffs who claim injury from purposeful administrative inaction. Here, as there, the improper approval of grants may perpetuate existing patterns of racial (and economic) segregation. This claim under the 1968 Civil Rights Act distinguishes *Warth* v. *Seldin,* as noted by Judge Zampano in *Accion Hispana* v. *Town of New Canaan,* Civ. No. B-312 (D. Conn. August 18, 1975). The plaintiffs have alleged sufficient injury to their protected interests to permit them to bring their claims into court.

IV.

As has been made clear by the preceding discussion, this case involves the new statutory framework for community development funding adopted by Congress in 1974. Title I of the Housing and Community Development Act of that year consolidated ten categorical grant programs into a single block grant program.[27] A three year community de-

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[26] See Parts IV and V *infra.*

[27] The new Community Development Program replaced the following ten development programs administered by the Department of Housing and Urban Development: the Public Facilities Loan Program authorized by Title II of the Housing Amendments of 1955; the Open Space Program authorized by Title VII of the Housing Act of 1961; the Planning Advance Program authorized

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velopment plan was required as part of the application, and appropriations were authorized through Fiscal Year 1977. Congress intended to streamline the administration of these federal programs,[28] by minimizing HUD's "front-end" review, substituting annual performance monitoring at the time when the future funding levels of grants to the particular community would be determined.[29] In place of the elaborate administrative review by federal officials which preceded grant approval under the ten programs, the new statute establishes a 75-day period, within which HUD must disapprove the application, or else it is automatically approved.[30] Furthermore, the statute directs HUD to approve the grant unless certain very limited conditions exist: (1) the community's true needs are not reflected in the application; or (2) the proposed projects will not meet the needs described; or (3) the proposal does not comport with other legal requirements.[31]

The new Act also gave local communities a greater role in determining how to spend their federal funds by requiring citizen participation and expanding the range of

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by Sec. 702 of the Housing Act of 1954; the Water-Sewer, Neighborhood Facilities and Advanced Land Acquisition Program authorized under Title VII of the Housing and Urban Development Act of 1965; the Urban Renewal, Code Enforcement and Neighborhood Development Programs authorized by Title I of the Housing Act of 1949; and the Model Cities Program authorized by Title I of the Demonstration Cities and Metropolitan Development Act of 1966.

[28] 42 U.S.C. § 5301(b)(3) (1975 Supp.). *See also,* H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 2, 3 (1974); S. Rep. No. 93-693, 93d Cong., 2d Sess. 48, 49 (1974).

[29] 42 U.S.C. § 5304(d) (1975 Supp.).

[30] 42 U.S.C. § 5304(f) (1975 Supp.).

[31] 42 U.S.C. § 5304(c) (1975 Supp.).

eligible activities. All the projects, however, must be directed toward accomplishing the central objective of the legislation

> "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."[32]

Congress did not leave local communities with merely this broad statement of purpose. Rather, it legislated seven specific goals, thereby establishing national priorities to govern the use of community development funds. The Act also sets forth an extensive list of eligible activities, and requires that HUD disapprove applications for grants for any project not so qualified.[33] Three of the seven specific goals explicitly urge that moneys be spent on behalf of persons of low and moderate income.[34] Two speak directly,[35] and three more indirectly,[36] to the housing needs of that segment of the populace.

The plaintiffs' position is that one of these Congressional goals, in particular, is of great importance in this lawsuit —that concerned with reducing:

> "the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods

[32] 42 U.S.C. § 5301(c) (1975 Supp.).

[33] 42 U.S.C. § 5305 (1975 Supp.) describes the eligible activities; 42 U.S.C. § 5304(c)(3) (1975 Supp.) requires disapproval of any application that proposes ineligible activities. Clarifying regulations were issued recently. 24 C.F.R. § 570.200 *et seq.;* 41 Fed. Reg. 2765 (January 19, 1976).

[34] 42 U.S.C. § 5301(c)(1), (3), (4) (1975 Supp.).

[35] 42 U.S.C. § 5301(c)(3) and (6) (1975 Supp.).

[36] 42 U.S.C. § 5301(c)(1), (2), (5) (1975 Supp.).

> through the spatial deconcentration of housing opportunities for persons of lower income. . . ."[37]

They argue that this is one of the primary goals of the Act, and that it was to be achieved, at least in part, through another aspect of the Act—the Housing Assistance Plan.[38] The Housing Assistance Plan (HAP), which is to be completed by the applicant community, must contain a survey of the housing stock of the community, an assessment of its housing needs, a goal for the provision of assisted housing, and a description of the location of existing and proposed lower-income housing. The 1974 Act also made the HAP the basis for assistance under many of the federally-subsidized, low-income housing programs.[39] As such, it is an important link between the housing and the community development sections of the Act.[40] The significance of this cannot be overestimated. Congress left no doubt of the pivotal role it intended for the HAP by excluding it from the list of application requirements which might be waived by the Secretary.[41]

The plaintiffs charge that HUD disregarded the statute by approving these grants without requiring the communities to complete one element of the "needs" section of

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[37] 42 U.S.C. § 5301(c)(6) (1975 Supp.).

[38] The HAP is described in 42 U.S.C. § 5304(a)(4) (1975 Supp.).

[39] Pub. L. No. 93-383 § 213; 42 U.S.C. § 1439 (1975 Supp.). This section virtually insulates a community from unwanted federally-assisted housing projects by permitting it to object to any application for assistance it deems "inconsistent" with its HAP.

[40] The newly-proposed HUD Regulations, note 11 *supra*, 24 C.F.R. § 570.303; 41 Fed. Reg. 2347 (January 15, 1976), acknowledge the importance of the HAP, describing it as "one of the most significant parts of the community development application process, [with] . . . a significant impact on various aspects of HUD-assisted housing program activities." *Id.* at 2348.

[41] 42 U.S.C. § 5304(b)(3) and (4) (1975 Supp.).

the HAP; that part which requires a community to estimate the housing needs of low income persons "expected to reside" within its borders.[42] Six of the defendant towns[43] had their grants approved despite their submission of a "zero 'expected to reside'" figure on their applications. The plaintiffs argue that this was not an accurate estimate of the housing needs which existed among persons in this category.[44] This omission, they argue, effectively emasculated the "needs" section of the applications themselves. They further argue that, if what they describe as "needs"

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[42] 42 U.S.C. § 5304(a)(4)(A) (1975 Supp.). This information is to be given in Table II C of the applicant's Housing Assistance Plan.

[43] All but East Hartford.

[44] HUD's regulations state that this figure refers to lower income persons and families "planning or expected to reside in the community as a result of planned or existing employment facilities." 24 C.F.R. § 570.303(b)(2). The plaintiffs offer, as examples of why they question the accuracy of a "zero" figure for any of the defendant towns, the fact that 4,600 Hartford residents commute to work in East Hartford, and that 6,980 more work in West Hartford. Testimony of Jonathan Colman, September 22, 1975. These figures were from a study prepared by HARCON Associates, for the City of Hartford, based on information from the Connecticut Department of Labor. Furthermore, a study conducted in Glastonbury identified 806 persons working in the Town who resided elsewhere, but wanted to live in Glastonbury, and were eligible for federal housing assistance under the Section 8 program.

As Mr. Paul Davidoff, a lawyer and urban planner who served as a consultant to the City of Hartford in its review of the defendant towns' grant applications, testified:

> "At the end, a judgment had to be made. . . . [A] community might have made, for the first year, a tentative judgment. It might have been wrong. . . . But it isn't zero, because the zero figure is patently absurd in terms of the reality of what is happening in each of these communities. There is no basis at all, in fact, in any of the data on the growth of these communities . . . for zero to be put in."

Hearing of September 23, 1975.

had been included, the projects proposed by the towns would then have been inappropriate to the "needs" disclosed for the community. If either of these are true, they contend, the Secretary would have been mandated to disapprove the applications, under § 5304(c)(1) and (2). Finally, they also contend that HUD's approval of these grants, despite the towns' failure to make a realistic projection of the influx of new low-income residents, is contrary to the "legal review" duties imposed upon the Secertary by § 5304(c)(3). This is the source of their claims under the federal civil rights acts; it is also the basis of their claim that HUD has not even complied with the 1974 Act itself.

HUD's failure to require an accurate projection of low-to-moderate income persons expected to reside in the communities was not the result of an oversight. On May 21, 1975, while six of the seven communities' applications were still in the process of HUD review, the HUD Area Office received a memorandum from David O. Meeker, Jr., Assistant Secretary for Community Planning and Development at HUD.[45] That memorandum informed the com-

[45] This memorandum, sent to all area office directors and all community planning and development division directors, was added to the record as Plaintiffs' Exhibit 12, at trial, and as Exhibit B to the Affidavit of Lawrence Thompson, August 25, 1975. Mr. Thompson is Director of the Hartford Area Office of HUD. The memorandum provides, in pertinent part, that:

> "Where, in the opinion of the reviewer, it is reasonable to assume that a significant portion of the potential need has not been included in the needs table of the HAP, the applicant should be contacted indicating that prior to HUD's tender of contract the applicant must:
>
> (a) Adopt the HUD figure . . ., or
>
> (b) Adopt its own figure . . ., or

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munities that they would be permitted to obtain approval of their first year grant applications, even without submitting figures in the "expected to reside" category. Two other approaches, involving estimates of this need, were suggested in this memorandum, but the option of whether to adopt them, or not to submit any figure, was given to each applicant community.[46] Mr. Thompson testified that the Meeker Memorandum was issued in response to "the

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> (c) Indicate what steps the applicant intends to take in identify [sic] a more approprite needs figure by the time of its second year submission."

The plaintiffs do not challenge the procedural propriety and legal effect of the May 21, 1975 Meeker Memorandum. Paraphrasing the analogous decision in *Fletcher* v. *Housing Authority of Louisville*, 491 F.2d 793, 799 n.10 (6th Cir.), *vacated and remanded*, 419 U.S. 812 (1974), it is HUD's decision to implement the memorandum, and not its issuance, which is involved here. Offering the options presented by the Meeker Memorandum to the six defendant towns is what the plaintiffs complain about, not the compliance by HUD with rule-making procedures before it issued the memo.

The degree of control exercised over the entire community development funding process by the HUD central office, in Washington, D. C., is illustrated by an excerpt from an earlier HUD directive, also issued by Mr. Meeker. Meeker Memorandum of November 29, 1974. Exhibit A to Affidavit of Lawrence Thompson, August 25, 1975. This earlier memorandum directs that:

> "No CD programs may be approved, even conditionally, without approval of the HAP. Therefore, disapproval of the HAP amounts to disapproval of the whole CD program. Since CD plan disapproval can only be made at the Central Office, Area Offices finding a HAP unacceptable must follow the disapproval procedure described below. . . . The power to disapprove applications for entitlement funds is not delegated below my office."

[46] In letters sent out from the Community Planning and Development Division of the Area Office on June 2, 1975, to each of these six applicant communities. Because the local HUD Area Office was unable to develop its own "expected to reside figures, only the second and third options of the Meeker Memorandum were presented to these towns.

difficulty all communities across the country were having on this 'expected to reside' element." The local HUD office approved these six grants pursuant to that directive. Thus, neither the towns nor the Area Office are entirely at fault.

The plaintiffs challenge this HUD directive, characterizing it as a *de facto* waiver of the "expected to reside" element of the Housing Assistance Plan, contrary to the non-waiver provision of the 1974 Act. The government argues that this was simply a deferral of that element, and well within HUD's authority in administering the Act.

Of course, deference is due to the construction of a statute by the administrative department responsible for its implementation. *Udall* v. *Tallman,* 380 U.S. 1 (1965). But this "sound principle . . . normally applies only where the relevant statutory language is unclear or susceptible of differing interpretations." *Shea* v. *Vialpando,* 416 U.S. 251, 262 n.11 (1974). Thus, if the statute gives specific direction. *Koshland* v. *Helvering,* 298 U.S. 441, 447 (1936), or the administrative interpretation is not consistent with either the statute, *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974), or Congressional intent, *Espinoza* v. *Farah Manufacturing Co.,* 414 U.S. 86, 94 (1973), the administrative agency cannot amend it by regulation. *Koshland* v. *Helvering,* 298 U.S. 441, 447 (1936). This salutary rule is to be applied by the court to prevent "the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building* v. *Labor Board,* 380 U.S. 300, 318 (1965). Although "[t]he court is not empowered to substitute its judgment for that of the agency" on matters of fact, *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971),

> "the courts are the final authorities on issues of statutory construction, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute.' "

Volkswagenwerk v. *FMC,* 390 U.S. 261, 272 (1968) (citations omitted). As the Supreme Court stated in *Manhattan Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law —for no such power can be delegated by Congress— but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Undaunted by these principles of law, HUD contends that the Meeker Memorandum was not in conflict with the statute, but merely supplementary to it. However, the statute could not be more clear. The Secretary was permitted to waive all or part of paragraphs (1), (2), and (3) of 42 U.S.C. § 5304(a), under certain conditions. And the Secretary was also permitted to accept the applicant community's certification that it had complied with paragraphs (5) and (6). Only paragraph (4), that describing and requiring the HAP, is not mentioned. The canon of construction *inclusio unius est exclusio alterius* compels the conclusion that the Secretary was not empowered to waive the requirement that the application include a Housing Assistance Plan for the community. Such a creation of additional exceptions to statutory requirements, by administrative action, is not favored. *Carey* v. *Local Board No. 2, Hartford, Connecticut,* 297 F. Supp. 252, 260 (D. Conn.), *aff'd,* 412 F.2d 71 (2d Cir. 1969).[47]

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[47] *See also, Marsano* v. *Laird,* 412 F.2d 65 (2d Cir. 1969).

The defendants correctly observe that HUD has not waived the entire HAP, but merely one of the elements that go into the community's assessment of its needs for lower-income housing.[48] The failure to submit a figure for the "expected to reside" category does not detract, for example, from each town's calculation of the housing needs of its present inhabitants who fall within the lower-income classification.[49] However, the "expected to reside" figure

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[48] As Mr. Lawrence Thompson testified at the hearing: "The Housing Assistance Plan requirement is a statutory provision and it's way beyond my power to waive it. Only the Congress could." Hearing of September 24, 1975.

[49] HUD Regulations equate the terms "lower" and "low and moderate" income families, and define this group as those

> "families whose annual incomes do not exceed 80 percent of the median family income of the area as determined by the Secretary with adjustments for smaller and larger families. . . ."

24 C.F.R. 570.3(o). The maximum annual income for these groups, during 1975 in the Hartford area, was $7,500 for low and $12,000 for moderate income families, depending on family size. Plaintiffs' Exhibit 10, Affidavit of William Slitt, September 16, 1975, ¶ 5.

The 1972 median incomes for the seven defendant towns, as set forth in the Affidavit of Jonathan Colman, July 29, 1975, Exhibit A to Plaintiffs' Memorandum in Support of Motion for A Preliminary Injunction, are as follows:

East Hartford:	$12,000
Enfield:	$12,789
Farmington:	$13,712
Glastonbury:	$15,000*
Vernon:	$12,338
West Hartford:	$14,796*
Windsor Locks:	$13,372

At the hearing of September 22, 1975, Mr. Colman testified as to the substantially lower 1970 Census median income figures for these towns. He further testified that even the 1972 figures quoted above had risen considerably by 1975.

* The base year for these two figures is not clear from the Affidavit.

is the keystone to the *spatial deconcentration objective* of the 1974 Act.[50] The recent report issued by the United States Commission on Civil Rights[51] emphasizes that the Housing and Community Development Act of 1974 envisions a new direction in federal assistance programs because it:

> "for the first time ties the provision of community development funds to the provision of lower-income housing by requiring each locality to submit a housing assistance plan as part of its community development block grant application. To receive *community development funding,* a locality must address its need for lower-income housing." (Emphasis added).[52]

The success of this new "carrot and stick" approach to the dispersal of low and moderate income groups depends upon the willingness of the suburban towns to provide federally-assisted housing within their boundaries. Of course, communities can choose not to participate in this program.[53] However, the Meeker Memorandum permits sub-

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[50] Testimony of Paul Davidoff, September 23, 1975. Mr. Thompson of HUD also agreed that the "expected to reside" figure is "an important requirement," and is "the only specific element of the Act that I can identify that operationally connects [the spatial deconcentration of lower-income persons with what we do and the applicants do." Hearing of September 24, 1975.

[51] *Twenty Years After Brown: Equal Opportunity In Housing,* United States Commission on Civil Rights (December, 1975).

[52] *Id.* at 32.

[53] As have both Berwyn and Cicero, Illinois. *Id.* at 61 n.19. Indeed, the Town of Vernon applied for only $25,000 to build a residential park, although its first-year entitlement grant under the statutory "hold harmless" formula, was over $100,000. 42 U.S.C. § 5306. Testimony of Jonathan Colman, September 23, 1975. The Town has since obtained a discretionary grant under the Act in the amount of $150,000. Letter of January 7, 1976, to the court, from Martin B. Burke, Town Attorney.

urban towns to obtain funding under the Act without the *quid pro quo* Congress decided to require—their taking steps to expand housing opportunities for low and moderate income persons. Indeed, this requirement is one of the most important differences between the Housing and Community Development Act of 1974 and the categorical grant community development programs it replaced.[54] Thus, the Meeker Memorandum removes the incentive Congress provided for these communities to accept such federally-assisted housing, thereby effectively gutting the "enforcement" provisions of the Act.[55]

I conclude that HUD acted contrary to law when it approved these six grants, without requiring the towns to make any assessment whatsoever of the housing needs of low and moderate income persons who might be "expected to reside" within their borders. When HUD offered the towns the third option presented by the May 21, 1975 Meeker Memorandum, to submit no figure at all, and they all selected that option, they acted contrary to the clear implication of the statute, that the HAP could not be waived by the Secretary.[56] The preliminary injunction

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[54] *Twenty Years After Brown: Equal Opportunity In Housing*, United States Commission on Civil Rights (December, 1975) at 60.

[55] The newly-proposed HUD Regulations, see note 11 *supra*, suggest that HUD is contemplating a partial waiver for yet another year, in certain circumstances. 24 C.F.R. § 570.303(2)(vi); 41 Fed. Reg. 2347, 2349 (January 15, 1975). As stated in note 11 *supra*, the validity of this proposed regulaion is not, however, before me in this case.

[56] This decision avoids any need to assess the propriety of HUD's conclusion that the needs, as described in these six towns' applications, were not "plainly inconsistent" with "significant facts and data, generally available and pertaining to community and housing needs and objectives," and that the proposed projects were not "plainly inappropriate to meeting the needs and objectives identified by the applicant, as required by 42 U.S.C. § 5304(c)(1) and

(footnote continued on following page)

previously entered in this case will be made permanent with respect to the Towns of Enfield, Farmington, Glastonbury, Vernon, West Hartford, and Windsor Locks.

V.

The grant to the Town of East Hartford presents a somewhat different problem. Unlike the other defendant towns East Hartford actually submitted a figure for the "expected to reside" portion of its HAP. The original HAP disclosed a total need for 135 assisted units in this category, including 81 elderly or handicapped, 16 large families, and 38 others. These figures were subsequently reduced, to 131, 78, 15, and 38, respectively, in a revision of the HAP undertaken at HUD's request.

The plaintiffs contend that these figures understated the actual number of lower income persons who should have been "expected to reside" in East Hartford, based on the facts and data available at that time. They argue from this that the Secretary acted contrary to law because she was obligated to disapprove the East Hartford grant application, since the "expected to reside" figures were "plainly inconsistent" with the facts and data. 42 U.S.C. § 5304(c)(1) (1975 Supp.).

The issues presented for decision are whether the Secretary's approval of this grant was: (1) within the scope of her authority; and (2) neither arbitrary nor capricious. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414-16 (1971). The answers to these questions

> "require the reviewing court to engage in a substantial inquiry. . . . Although this inquiry into the facts is to

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(footnote continued from preceding page)

(2) (1975 Supp.). Those issues are, however, addressed with respect to the East Hartford application, in Part V *infra* of this opinion.

> be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[57]

Here the answer to the first question is simple. Congress dictated that the grants be approved, unless the Secretary made certain determinations. HUD established review procedures which delegated the power to approve applications to the Area Directors, but retained the power to disapprove in Washington.[58] The administrative record discloses that these determinations were not made with respect to the East Hartford application. On the contrary, the Hartford Area Office did "not consider the information submitted by the City of Hartford as 'facts and data,' "[59] and so concluded that conditional approval was warranted.[60] The decision to approve the grant was certainly within the "range of choices that the Secretary can make." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971).

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[57] 401 U.S. at 415-16. The cautionary instruction concerning the narrow scope of review is particularly appropriate in this case, since the Secretary herself has been given only a very limited range of discretion. 42 U.S.C. § 5304(c) (1975 Supp.). Congress clearly built a presumption of approval into the Act with this restrictive review standard and the automatic approval provision. 42 U.S.C. § 5304(f) (1975 Supp.).

[58] Meeker Memorandum of November 29, 1974. Exhibit A to the Affidavit of Lawrence Thompson, August 25, 1975.

[59] Memorandum to the East Hartford Entitlement File, May 19, 1975. Attachment J to the Administrative Record for East Hartford.

[60] Memorandum to Lawrence Thompson, April 24, 1975. Attachment O to the Administrative Record for East Hartford. The grant approval letter, dated May 2, 1975, is Attachment L to the Administrative Record.

The second inquiry, however, presents more difficulty. The statute[61] requires me to determine, in essence, "whether the decision [to approve the grant] was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416. I conclude that the Secretary has abused her discretion in both respects. HUD's approval, without taking the steps required to obtain the "generally available" information it needed to evaluate these applications, and without considering such information, amounts to arbitrary and capricious decision-making. Furthermore, the decision to approve the East Hartford application, in the face of this "generally available" information, constituted a clear error of judgment, and was not in accordance with law. In other words, HUD was doubly at fault—it did not obtain the generally available information required for a proper review, and it acted upon the basis of inadequate information.

HUD does not claim that it was able to critically appraise the "expected to reside" figures in the East Hartford application. Mr. Lawrence Thompson, the Hartford Area Director, admitted that:

> "In reviewing the HAPs, it was apparent that there was an absence of reliable data upon which to evaluate the surveys of housing needs of lower-income groups expected to reside in the community as a result of planned or existing employment facilities."[62]

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[61] 5 U.S.C. § 706 provides:

"The reviewing court shall—

• • •

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[62] Affidavit of Lawrence Thompson, August 25, 1975, ¶ 12.

As a result, HUD was unable to calculate its own estimate of "expected to reside" figures, or even "to make a determination as to the accuracy of the figures supplied by the defendant towns."[63]

Mr. Thompson suggested that more data was not gathered because, in the time that would have taken, the 75-day review period would have been exceeded, and the grants would have been automatically approved.[64] He acknowledged that all the local communities were having great difficulty in developing "expected to reside" figures, and that this caused him to suspend processing of all pending applications during May 1975, to await expected instructions from HUD in Washington, D. C.[65] These instructions came in the Meeker Memorandum of May 21, 1975, discussed in Part IV of this opinion. That memorandum set forth a methodology, developed by the central office, for computing an "expected to reside" figure for a community, based on the U. S. Census Bureau's "Journey to Work" tables.[66] It was the apparent unavailability of these figures on a municipality-by-municipality basis for the Hartford SMSA that led the Area Office to conclude that it was unable to prepare its own "expected to reside" figures, or to review those proposed by East Hartford.[67] However, a similar breakdown, lacking only income figures for the commuters, proved to be available from the Connecticut Department of Transportation, on only two days' notice![68]

Mr. Thompson also stated that East Hartford was not given the opportunity to submit a "zero" as its "expected to reside" projection, as were the other six defendant towns,[69] only because its application was approved before processing was suspended.[70] Thus, it was simply happenstance that a figure for "expected to reside" was included in the East Hartford HAP at all. The record demonstrates that, so far as HUD was concerned, that number

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[63] Affidavit of William Flood, September 12, 1975, ¶ 5. Exhibit B to the Defendants' Memorandum in Support of Motion to Dismiss or in the Alternative for Summary Judgment. Mr. Lawrence Thompson testified to the same effect at trial, stating that HUD lacked the data necessary "to compute a substitute figure to the figure that was supplied by the applicant." Hearing of September 23, 1975.

[64] Pursuant to 42 U.S.C. § 5304(f) (1975 Supp.). Affidavit of Lawrence Thompson, August 25, 1975, ¶ 13. The East Hartford application was received by HUD on March 24, 1975. Supplemental Affidavit of Lawrence Thompson, September 12, 1975, § 19. Exhibit A to the Defendants' Memorandum in Support of Motion to Dismiss or in the Alternative for Summary Judgment. The application was approved in a letter from Mr. Thompson, dated May 2, 1975. Attachment L to the Administrative Record for East Hartford. Thus, approximately five weeks still remained on the "75-day clock" at the time the East Hartford application was approved.

[65] Supplemental Affidavit of Lawrence Thompson, September 12, 1975, ¶ 7. This problem was not limited to the Greater Hartford Area. Affidavit of Allan Thornton, November 6, 1975 ¶ 4.

[66] Meeker Memorandum of May 21, 1975. Plaintiffs' Exhibit 12 and Exhibit B to the Affidavit of Lawrence Thompson, August 25, 1975.

[67] Affidavit of William Flood, September 12, 1975, ¶ 4.

[68] Affidavit of Paul Davidoff, October 21, 1975, ¶ 9, and Affidavit of Jonathan Colman, October 22, 1975, ¶ 3.

[69] In letters sent out by the HUD Area Office on June 2, 1975 Affidavit of William Flood, September 12, 1975, ¶ 8.

[70] Supplemental Affidavit of Lawrence Thompson, September 12, 1975, ¶ 22. Indeed, East Hartford received a similar letter on June 5, 1975. Affidavit of William Flood, September 12, 1975, ¶ 9. Attachment M to the Administrative Record of East Hartford. This letter emphasized the importance of the "expected to reside" element of the HAP, informed the Town of the options the Hartford Area Office had extended to the other communities, and stated that East Hartford, while not required to alter its HAP at that time, would be required to address this need at the time of its next submission, in accordance with HUD regulations.

might have had no validity whatsoever—it was untested and untestable. HUD's approval of the grant to East Hartford in such circumstances cannot be considered a proper exercise of discretion. Rather, it was an abandonment of its duty to review and evaluate the housing needs projection for those persons "expected to reside" within East Hartford. I conclude that HUD's approval of East Hartford's grant application was contrary to law.

There is no doubt that HUD did not conduct a rigorous review of the East Hartford "expected to reside" projection. It justified this failure by pointing to an alleged absence of data. In fact, however, a wide variety of alternative data sources was available. For example, HUD's own instructions suggest the use of census materials; code enforcement records; local agency records; 701 plans; or studies done by reputable research, community service, or planning organizations, such as private consulting firms.[71] The proposed HUD Regulations also list several data sources, such as approved development plans; building permits; and major contract awards.[72] One of the plaintiffs' expert witnesses, Mr. Paul Davidoff, also listed a number of other possibilities including studies conducted by or for state agencies; plant or shopping center surveys; zip code information from the payroll records of local companies; or data gathered by the local chamber of commerce.[73] And Mr. Jonathan Colman, Director of Planning for the City of Hartford, testified that figures detailing commercial development, in the form of floor space completed or under construction, are compiled by the Connec-

[71] Instructions For Form HUD-7015.8 thru 11. Plaintiffs' Exhibit 2 at trial.

[72] 24 C.F.R. § 570.303(c)(2)(i)(A); 41 Fed. Reg. 2347, 2349 (January 15, 1976).

[73] Testimony at the Hearing of September 23, 1975.

ticut Department of Commerce.[74] The HUD Regulations[75] and instruction sheet[76] do not require that the data used to review grant applications be published. The standard is simply that it be "accessible . . . or . . . available to both the applicant and the Secretary. . . ."[77] The materials and data sources described above fall within this broad category, and HUD's failure to gather and consult them prior to its evaluation of East Hartford's grant[78] was an abdication of its responsibilities under the Housing and Community Development Act of 1974.[79]

The foregoing discussion is not intended to suggest that East Hartford invented its 135, then 131, figures, or that HUD's review of the East Hartford application was entirely passive. East Hartford developed its "expected to reside" projection from the waiting list for the East Hartford Housing Authority,[80] and the HUD Area Econo-

[74] Testimony at the Hearing of September 22, 1975. These figures can be used to estimate new employment opportunities generated by that construction. HUD's awareness of the relationship between new commercial construction and new employment opportunities is demonstrated by Plaintiffs' Exhibit 14, a letter to Stephen Fils, Town Manager of Farmington, from Lawrence Thompson, March 9, 1972.

[75] 24 C.F.R. § 570.306(b)(2).

[76] Plaintiffs' Exhibit 2, note 71 *supra*.

[77] 24 C.F.R. § 570.306(b)(2).

[78] It is clear from the record that HUD's review was not based on this sort of data. "I chose to approve these seven applications after determining they were not plainly inconsistent with the facts and data avaiiable [*sic*] at that time. Affidavit of Lawrence Thompson, August 25, 1975, ¶ 14. Also, see Affidavit of William Flood, September 12, 1975, ¶ 5.

[79] 42 U.S.C. § 5304(c)(1) (1975 Supp.).

[80] Attachments D and K to the Administrative Record for East Hartford. The Town used the 40 percent of the applicant pool who were not residents of East Hartford as its "expected to reside" estimate.

mist, William Flood, commented upon the unsatisfactory nature of that methodology.[81] The Hartford Area Office itself

> "agreed [with the City of Hartford] that a more comprehensive approach should be reflected in future HAPs. [But] HAO considered that using the waiting list *and 1970 census data* provided a satisfactory initial estimate of housing need in the absence of significant regional data . . ." (Emphasis added).[82]

Even if it could be said that HUD adopted that waiting list as the data source for computing an "expected to reside" figure, and used it to review the East Hartford application, the approval of the grant on that basis constituted an abuse of discretion. The waiting list, alone, was clearly insufficient as a data base. Mr. Flood acknowledged this when he indicated that the first HAP submitted by East Hartford, using only the Housing Authority waiting list, was "clearly inconsistent with generally available data."[83] The revised HAP, which he found "marginally adequate" and "quite marginal", was based on the 1970 U. S. Census figures for low income persons in East Hartford, as supplemented by the Housing Authority waiting list information. That HAP raised the "currently existing need" figure from 331 to 473, increased the first and third year goals by 60 units,[84] and shifted

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[81] Memorandum to Harry Reese, April 18, 1975. Attachment O to the Administrative Record for East Hartford.

[82] Memorandum to the East Hartford Entitlement File, May 15, 1975. Attachment J to the Administrative Record for East Hartford.

[83] Memorandum to Harry Reese, April 14, 1975. Attachment O to the Administrative Record for East Hartford.

[84] The increase consisted entirely of an allocation of $120,000 of Section 8 funds. All 60 units were to be in already existing housing.

the emphasis toward a closer balance between elderly and non-elderly housing.[85] However, no change was made in the data base from which the "expected to reside" element of the HAP was calculated, and that figure was actually reduced in the revised HAP![86]

The objections Mr. Flood made to the use of the waiting list alone to estimate currently existing need apply with equal, if not greater, force to its use as the sole source for the "expected to reside" figures. For example, he pointed out that Section 8 subsidies are available to many families with incomes higher than the limits set for public housing, and that there are only a small number of units for large families in the existing inventory of the East Hartford Housing Authority. He also objected to the stale nature of the waiting list data, and the poor reputation of the housing authority.[87] The comments from Education/Instruccion, a local civil rights research organization dealing with discrimination in housing and employment, parallel those made by Mr. Flood. They also point out that the availability of housing through the East Hartford Housing Authority was not publicized outside of East Hartford itself.[88] The Town itself acknowledged the validity of the criticism concerning the shortage of large-family units when it allocated a disproportionate share of its Section 8 funds to meet the needs of large families.[89]

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[85] Attachments D and K to the Administrative Record for East Hartford.

[86] *Id.*

[87] Memorandum to Harry Reese, April 14, 1975. Attachment O to the Administrative Record for East Hartford.

[88] Letter to Ms. Connell, Chairwoman of the Ad Hoc Committee on the Housing and Community Development Act, CRCOG. Attachment H to the Administrative Record for East Hartford.

[89] Attachment K to the Administrative Record for East Hartford.

The waiting list for the East Hartford Housing Authority may well be one factor upon which to base the "expected to reside" projection, but it cannot properly be the only one. The passivity with which HUD reviewed this element of the East Hartford HAP is well illustrated by the statement, made in comparing the criticisms of the application to East Hartford's response, that:

> "The inclusion of these figures [131] in the HAP appears to respond to the explicit comment of 'no reflection of needs' [of those presently working in East Hartford] made by Hartford. CROG's comment on this matter is also answered by the computation listed above."[90]

HUD had a duty to do more than accept any "expected to reside" figure proposed by East Hartford, however inadequate its size or derivation.[91] The administrative record discloses that it did not live up to that duty.

VI.

For the reasons outlined in the foregoing opinion, I have concluded that the Secretary abused her discretion in approving the community development entitlement grants to

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[90] Memorandum to the East Hartford Entitlement File, May 15, 1975. Attachment J to the Administrative Record for East Hartford.

[91] HUD's Acting Regional Administrator, Harold Thompson, emphasized this duty in a memorandum to the Area Director, Lawrence Thompson:

> "In sum, these allegations [by the City of Hartford] are, in our opinion, well-documented and of a very serious nature. Therefore, whatever your decision may be regarding this matter, please ensure that the administrative file reflects a reasonable decision-making process."

Plaintiffs' Exhibit 13, Memorandum to Lawrence Thompson, April 29, 1975.

the seven defendant communities. The preliminary injunction previously entered in this case is hereby made permanent. The seven defendant Towns are enjoined from drawing upon the Treasury, or spending in any fashion, the entitlement funds granted to them pursuant to Title I of the Housing and Community Development Act of 1974, which are the subject of this lawsuit. The Towns may seek to obtain a new approval of these grant applications from HUD. This injunction may be lifted upon the filing with the court of such a new approval.

It is.

So ORDERED.

Dated at Hartford, Connecticut, this 28th day of January, 1976.

United States District Judge
M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of August one thousand nine hundred and seventy-seven.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. J. JOSEPH SMITH
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges,

76-6049
76-6050
76-6059

City of Hartford, on behalf of itself and its inhabitants, Richard Brown, Nicholas R. Carbone, John Cunnane, William A. DiBella, Allyn A. Martin, Richard Suisman, Margaret V. Tedone & Olga W. Thompson in their official capacity, Mirian Jordan & Fannie Mauldin,

Plaintiffs-Appellees

v.

Carla A. Hills, in her capacity as Secretary of the Dept. of Housing and Urban Development, Harold G. Thompson, in his capacity as Acting Regional Administrator

of the Dept. of Housing & Urban Development, Lawrence Thompson, in his capacity as District Director of the Dept. of Housing & Urban Development & The Dept. of Housing & Urban Development & West Hartford, Glastonbury, Farmington, Windsor Locks, Vernon, Enfield & East Hartford,

Defendants

Town of East Hartford & Town of West Hartford,
Town of Glastonbury,

Defendants-Appellants.

Secretary of Housing and Urban Development,

Amicus Curiae.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court with instructions to dismiss the complaint in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FILED
AUG 15 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Supreme Court, U. S.
FILED
DEC 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-639

CITY OF HARTFORD, on behalf of itself and its inhabitants, Miriam Jordan and Fannie Mauldin,

Petitioners,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-639

CITY OF HARTFORD, on behalf of itself and its inhabitants, Miriam Jordan and Fannie Mauldin,

Petitioners,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Question Presented

Whether on the facts of this case these particular plaintiffs—the City of Hartford, Miriam Jordan and Fannie Mauldin—had standing to bring this particular suit.

Statement of the Case

On August 22, 1974, Congress enacted what came to be known as the Housing and Community Development Act of 1974 (hereinafter, "the Act"). This suit deals with a dispute arising out of applications for funds made pur-

suant to Title I of that Act, 42 U.S.C. §§ 5301-5317, entitled "Community Development". The funds provided under this Title could be used for a wide range of community development activities. Significantly, however, *the construction of low or moderate income housing was not an eligible activity.* Another significant feature of the Act was its return to the individual communities of responsibility for ascertaining their own local needs and devising programs to meet them on a local level.

One aspect of this program was to be the Housing Assistance Plan, drawn up by the applicant town as part of its application. 42 U.S.C. § 5304(a)(4). The particular portion of that provision which is the focus of this suit is the "expected to reside" computation set forth in 42 U.S.C. § 5304(a)(4)(A), wherein the applicant was required to submit a plan which

> (A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons (including elderly and handicapped persons, large families, and persons displaced or to be displaced) residing in *or expected to reside* in the community. (emphasis supplied)

This "expected to reside" category was an innovation of the Act. Its intent is best expressed in the Report of the House Committee on Banking and Currency (page 3a of the Addendum to the main brief in the Court of Appeals):

> Clearly, those already employed in the community can be expected to reside there. Normally, estimates of those expected to reside in a particular community would be based on employment data generally available to the community and to HUD. However, in many cases, communities should be able to take into account planned employment facilities as well, and their housing assistance plans should reflect the additional housing needs that will result.

"Lower income persons" were defined in HUD's Instructions for completing the application (Appendix below, page A337) as "families whose income does not exceed 80 percent of median income for the area, with adjustments upward or downward for larger or smaller families, or other limits established by HUD because of construction cost levels or for other reasons".

The Court of Appeals—whose opinions are printed at 561 F. 2d 1032 and 1048—succinctly summed up the essence of the "expected to reside" component in its *en banc* opinion (Appendix to Petition A8) as follows:

> The expected to reside figure is not a goal for the future which communities are required to satisfy, but merely a prediction of what is going to happen. It is a device used to plan for future population changes, not a device for achieving them. A modification of the expected to reside figure would have no greater impact on the number of future residents than a modification of tomorrow's weather forecast would have on tomorrow's weather.

The "expected to reside" feature reflected the premise of the Act that people like to live in the same town where they work. Hence, the Act established a statutory presumption that those "lower income persons" who work in a given town must be "expected to reside" there, and the town should devise its community development projects with them in mind.

There is no allegation in the case that the towns did anything but what HUD told them to do. They (including Hartford) submitted their applications and those applications began the detailed processing route for such applications. As HUD began processing these applications in the spring of 1975, however, it became apparent that in the six or eight months since enactment of this innovative "expected to reside" concept, both HUD and the communities across the United States lacked the data or the methodology to compute meaningful, intelligent figures.

Accordingly, on May 21, 1975, Assistant HUD Secretary David O. Meeker issued what has since been called the "Meeker Memorandum", which is set forth in the Court of Appeals Appendix at A139. This memorandum, among other things, permitted applicants to submit and have accepted for HUD processing first-year applications without any "expected to reside" computation upon the applicant's indication of what steps the applicant intended to take to identify a more appropriate needs figure with its second-year application (the Act contemplated three one-year applications). HUD's Hartford office determined that for Connecticut there was insufficient data for HUD to compute meaningful "expected to reside" figures for Connecticut towns. Accordingly, both Hartford and the defendant towns submitted "0" figures (except for East Hartford, which had submitted its application before issuance of the Meeker Memorandum and had included an "expected to reside" figure of 131).

The applications were processed, they were approved, and the plaintiffs sued HUD because the towns had not included any "expected to reside" figures (except for East Hartford, whose figure of 131 plaintiffs disputed as inadequate).

There was a full hearing on the merits, after which the District Court ruled that plaintiffs had standing and that an injunction ought to issue barring disbursement of the funds to the seven towns until they had amended their applications to include an "expected to reside" figure. While the appeal was pending in the Second Circuit five of the seven towns (including respondents Glastonbury and West Hartford) revised their applications, HUD approved them, and petitioners have informed the District Court that they have no objection to disbursement of the funds. Respondent East Hartford, having originally provided an "expected to reside" figure of 131, has not revised that figure and deems it sufficient to comply with the requirements of law.

Plaintiffs in this case are the City of Hartford, a municipal corporation, and two persons residing in Hartford. Those two persons do not *reside* in any of the defendant towns nor do they claim they want to reside there. They do not *work* in any of the defendant towns nor do they claim they want to work there. There is no claim and no evidence that their present housing in Hartford is anything but adequate and at least standard. They claim and have given evidence of no connection between them and any of the defendant towns.

ARGUMENT

These Plaintiffs Lack Standing to Bring This Suit on These Facts

Respondents submit, and the Court of Appeals has agreed, that on the facts of this case these particular plaintiffs have failed to sustain their burden of proving they have standing to bring this suit seeking this relief. They submit that petitioners cannot meet any of the criteria established by this Court in Rule 19(b) of its Rules for determining whether to grant a petition for a writ of certiorari:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

An appropriate starting point is the state of the law on standing against which this issue must be decided.

A. The Law

The law on standing to sue has been recently restated in two opinions of this Court: *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970)—hereinafter, *Data Processing;* and *Warth* v. *Seldin,* 422 U.S. 490 (1975)—hereinafter, *Warth. Data Processing* sets forth two tests, both of which plaintiffs bear the burden of satisfying, by which to measure plaintiffs' right to invoke the assistance of the courts: (1) "the question whether the interest sought to be protected by the complainant is arguably within the zone of the interests to be protected or regulated by the statute or constitutional guarantee in question" *Id.* at 153; and (2) "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" *Id.,* at 152.

Warth, decided but two years ago and prior to the decision below in this case, went considerably beyond the skeletal outlines of standing described in *Data Processing* in expanding upon the requirements plaintiffs must satisfy. These can be summarized in three sections of that opinion:

> Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class" *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974). See e.g., *Bailey* v. *Patterson,* 369 U.S. 31, 32-33 (1962).
>
> *Id.,* at 502

But there remains the question whether petitioners' inability to locate suitable housing in Penfield reason-

ably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a *substantial probability* that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. *Linda R. S.* v. *Richard D.,* 410 U.S. 614 (1973).

> *Id.,* at 504 (emphasis supplied)

We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him,* and that he personally would benefit in a trangible way from the courts' intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger* v. *Reservists to Stop the War,* 418 U.S., at 221-222.

> *Id.,* at 508

In deciding the question of plaintiffs' standing after a hearing on the merits (as opposed to a motion to dismiss) neither the trial court nor reviewing courts may lift from plaintiffs their burden of proof on the question by accepting as true all material allegations of the complaint, and construing the complaint in their favor. *Id.,* at 501. The court below and this court, therefore, must measure plaintiffs' standing by the evidence adduced, not by adopting either unwarranted deductions of fact or legally conclusory allegations. Indeed, even on a motion to dismiss, the court would *not* be expected to accept as true or construe in favor of plaintiffs any allegations except *material* alle-

gations of *fact*. *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972); *Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F. 2d 97 (CA-5; 1974); *Avins* v. *Magnum*, 450 F. 2d 932 (CA-2; 1971); see generally 2A Moore, *Federal Practice*, pp. 2265-2269, § 12.08 (Second Edition).

Also, it should be borne in mind that the standing of plaintiffs with respect to one defendant may not suffice as standing with respect to other defendants. This Court has stated that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617, n.3 (1973). The natural corollary of that has at least by implication been recognized: while those statutes may confer standing upon plaintiffs to whom statutory duties are owed as to defendants owing those statutory duties, that standing does not necessarily cover defendants not chargeable by statute with discharging such duties. *Evans* v. *Lynn*, 537 F. 2d 571, 589 (CA-2; 1976), cert. den. —— U.S. —— (1977). And with respect to those statutory duties to support standing there must be an allegation and showing that the defendant owing the duty "consciously and expressly adopted a general policy [of nonenforcement] which [is] in effect an abdication of its statutory duty." *Adams* v. *Richardson*, 480 F. 2d 1159, 1161 (C.A.D.C.; 1973—*en banc, per curiam*).

All of these principles of standing have recently been affirmed once again in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); and in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 45 U.S.L.W. 4073, 4076 (1977).

Applying these general principles of standing to the facts of this case, the question to be answered in determining standing becomes: have plaintiffs alleged and shown specific, concrete facts demonstrating that what the federal

defendants and each of the defendant towns did deprived them personally of a specific statutory right or entitlement affirmatively owed to them personally by each defendant to low and moderate income housing; and that if each of the defendants had refrained from doing what they did, these plaintiffs would have been able to find low and moderate income housing; and that if the court affords these plaintiffs the relief they seek against these defendants, their asserted inability to find low and moderate income housing will be removed?

B. The Relief Petitioners Sought

Petitioners have made much of the claim that their standing is based on the possibiilty that some of the HUD funds originally allocated to the seven towns would be *re*allocated to Hartford if they failed to comply with the Court's injunction and to revise their "expected to reside" figures. A brief answer to *this* claimed standing basis is, of course, that it depends *not* upon the relief petitioners sought but rather upon the failure, the *in*effectiveness, of that relief.

The plaintiffs in this case did not seek the reallocation of defendants' funds to Hartford. Plaintiffs did not need any more money. Hartford had already been granted over $10,000,000 under this same Act, filing the same kind of application as did the defendants, with the same "0" expected to reside figure.

Hartford's interest, therefore, was not in shifting more funds to Hartford. Hartford wanted the towns to have the money, but to use it only in ways Hartford approved. Hartford thus wanted to control the use by its neighbor towns of funds they received from HUD. That was somehow considered to serve Hartford's purposes better than having the money to spend in Hartford itself. The situation thus is remarkably similar to that which was found to be so in *Evans*, at 598: "[plaintiffs] are invoking the Court's jurisdiction *solely* to impose upon the [defendants] priorities which the [plaintiffs] favor."

Consistent with that desire, therefore, the relief plaintiffs sought was that the Court "preliminarily and permanently enjoined the defendants [HUD and its personnel, the only defendants plaintiffs sued; HUD brought in the towns as additional parties defendant] from disbursing or transferring any funds pursuant to the seven grant applications heretofore set forth until such time as said communities submit to the defendants appropriate documents indicating compliance with the provisions of 42 U.S.C. 5301, 42 U.S.C. 3608(d)(5), 42 U.S.C. 2000(d)" Court of Appeals Appendix, A 26-27.

Based upon that prayer for relief, we turn to the question of what benefits *plaintiffs*—these particular plaintiffs—could hope to derive from this suit. How *personally* have *these* plaintiffs been injured by what each of the defendants has done? What is the connection between the injury plaintiffs demonstrate (if any) and the infractions (if any) of these defendants? Have plaintiffs demonstrated, at their trial on the merits, that absent these infractions by defendants they would not have suffered these particular, concrete, personal injuries? How, given the relief they seek in their complaint, will the City of Hartford and the two individual plaintiffs be benefited "in a tangible way from the court's intervention"? *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975).

C. What Tangible Benefits Might Hartford Receive?

1. If The Towns Altered Their "Expected To Reside" Figures

If the seven towns were now to alter their "expected to reside" figures, how would the plaintiff City of Hartford be benefited in a tangible way? It must be recalled that the "expected to reside" figure is an estimate of the number of lower income people (as defined in HUD regulations) who *now work* or because of planned employment facilities will *probably be working* in town, a percentage

of whom would be "expected to reside" in the town where they work. It must also be remembered that the purpose of that figure is not to set the floor for the number of homes that will be built in town, for those jobs might not materialize and therefore these people would no longer be "expected to reside" in town under the Act. It must also be remembered that no part of these Title I funds may be used to build housing. These funds may only be used for community development purposes; and the "expected to reside" figure is but one part of a housing assistance plan component designed to estimate the number and type of people the town must keep in mind in devising its community development plans, so as to ensure that these plans will be of maximum benefit to these people when, as and if they move into town (or remain in town, if already there).

In addition to the legal impossibility of using any Title I funds to build housing—whether in the seven towns or in Hartford—it should also be noted that the uncontradicted testimony of the HUD Area Director at trial was that all of the Title II funds that *could* be used for housing construction had already been allocated and none was available. Hence, the finding of the Court of Appeals (Appendix to Petition, A5):

> A community's estimate of the number of low-income persons expected to reside within its borders has never been a self-fulfilling prophecy. The figure entered on a community's application does not alter its future population, but merely predicts it. It is theoretically possible for an expected to reside figure to influence the future availability of low-income housing in a given community, because federal housing assistance subsidies[1] are allocated to communities based in part on the anticipated needs reflected in their housing assistance plans. *See* Title II of the Housing and Community Development Act of 1974 § 213(d)(1), 42 U.S.C. § 1439(d)(1). In this case, however, the housing as-

sistance plans submitted by the defendant towns fully utilized all available Title II funds. Therefore, even if the seven defendant communities had revised their expected to reside figures upward, no additional housing subsidies would have been obtained, because no additional funds were available.

Thus, first of all, if as petitioners prayed for in their complaint the towns amended their applications and included "expected to reside" figures satisfactory to Hartford, Hartford would have successfully foreclosed the possibility that *it* would get any more funds from HUD through reallocation. If the Court granted Hartford the relief it sought, Hartford would get no money.

Second, if the towns amended their applications as Hartford wants, it would not cause the slightest increase in or improvement of the housing stock of Hartford.

Third, it would not necessarily cause any decline in Hartford's expenditures for welfare or for housing subsidies. In the first place, no new housing would be built in the towns with this Title I money; that would be illegal. And all the Title II funds were already spoken for. In the second place, the "expected to reside" estimate is just that—an estimate for community development planning purposes—and does not commit the town in the future to build that number of houses. Indeed, as recent economic history all too starkly reveals, were the planned employment facilities on which the figure was based suddenly to evaporate and companies decide not to build or expand, those "expected to reside" under the Act would no longer be expected to do so because they would have no jobs inducing them under the Act to move into town; and hence, presumably, the housing would not be built.

Assuming, however, that housing is built, jobs materialize, and the "expected to reside" figure becomes converted in time into a "new residents" figure, that presumably would have no effect (at least none demonstrated at trial) on Hartford's welfare or housing subsidy rolls. For by definition those who have moved from Hartford to the neighboring town where they work have *jobs* there. If they have jobs, if they are employed, *that* fact, and not the sites of their homes, would presumably remove them from the welfare and housing subsidy rolls; so that even if they continued to live in Hartford their employment status would be the determining factor, not that they were "expected to reside" elsewhere.

Even if these persons, though employed, did receive city welfare and city housing subsidies, there is no reason (and no evidence at trial) to conclude that their departure to neighboring towns would decrease the city rolls unless it can be found (and there was no evidence of this, either) that their places will not be taken by new births; by the natural inward migration of lower income people into Hartford to fill vacated premises; and, significantly, by the movement *into* Hartford of lower income people who *work* in Hartford and therefore, under the Act, would be "expected to reside" in Hartford. For "expected to reside" is not a one-way street running out of Hartford. The Act was not designed as an invitation to mass emigration from Hartford. It was premised on the job connection—that lower income people probably want to live where they *work*. And if they work in Hartford—at its large new Civic Center complex, or its new federal post office on Interstate 91, or at its new regional American Airlines office, or as a result of the residency ordinances requiring municipal employees to live in Hartford—they presumably must be "expected to reside" in Hartford, and Hartford under the Act must provide for them.

To say that Hartford's welfare and housing subsidy rolls would decline is also to assume (and there was no evidence of this, either) that the "expected to reside" figures for the neighboring towns would in fact consist of

Hartford residents, and those now on city welfare or housing subsidies at that, as contrasted with the distinct possibility that many of these people would be drawn from Willimantic, Bristol, Middletown, and other cities near these neighboring towns.

And finally, if the towns amended their applications, that would have no tangible, demonstrable effect on the nature, quality or number of community development projects Hartford would plan with its ten million dollars.

2. If HUD Had Rejected The Original Applications

Passing over the plaintiffs' limited prayer for relief and *Warth's* test of standing that plaintiffs must show a tangible personal benefit *from the court's granting of that relief,* it has been suggested in this case that Hartford was "injured in fact" because had HUD *originally* rejected the towns' applications, their funds would have been reallocable and Hartford *might* successfully have applied; and that that, if so, satisfies Hartford's standing.

This suggestion flies squarely in the face both of *Warth,* as set forth above, and of certain uncontested facts. First, HUD *could not* have denied the applications because they were filed in accordance with its own instructions. All it could have done was to rescind those instructions and ask the towns to resubmit their applications. *That* would not have made the funds reallocable. Even the District Court found the towns merely to have accepted an option HUD gave them; *HUD* was found to be at fault, not the towns. The fault was its granting of the option in the first place.

Second, nowhere in its complaint does Hartford claim it wants the money to be reallocated. Its prayer for relief does *not* seek rescission of the grants to the towns, thus arguably making the funds reallocable. Hartford wants the *towns* to have the funds, but after making "proper" application and for purposes approved by Hartford. Thus, the very relief Hartford prays for in the

complaint eliminates the possibility that the funds will be reallocable, and gives point to the Court's observation in *Evans* that "The link between the ill allegedly suffered and the remedy requested is so tenuous as to approach the non-existent". *Id.,* at 595.

Third, reallocation of Title I funds is governed by HUD regulations which limit their availability *only* to certain categories designated "urgent needs" (See 40 Federal Register No. 178, September 12, 1975). Petitioner City of Hartford has never either alleged or shown that it has *any* such urgent needs to be eligible for reallocation of funds originally allocated to the seven towns. Indeed, HUD in its first amicus brief in the Court of Appeals disclosed that in June of 1976, Hartford had put out a "feeler" for funds and HUD had indicated for just these reasons that none would be available. Thus, Hartford's one attempt post-judgment to bootstrap itself into an *ex post facto* standing failed.

Fourth, the Court ignores the uncontroverted testimony of the defendant Area Director that Hartford by law was—in September, 1975—already too late to apply for reallocated funds.

Thus, the petitioners' prayer for relief which eliminates the precondition for reallocation *plus* the absence of the prerequisite "urgent needs" *plus* the time bar of the regulations places Hartford squarely in the situation noted by the Second Circuit in *Evans*—and indeed, in a worse position:

> They claim only that, had the grants not been approved, the monies could conceivably have gone to some other, *totally imaginary* project in the County which *might* have had the result of making more housing available to them. *Id.* at 595.

Here, the possibility of reallocation (especially in light of the prayer for relief) is even less conceivable, and the

"urgent needs" are no less "totally imaginary." And this being so, there is no way, either, that the *individual* plaintiffs could gain standing on this quicksand base for "tangible benefits" from reallocation. There is not a scintilla of evidence in the record to support it.

3. If The Towns Fail To Amend Their Applications

Much the same arguments compel rejection of the idea that the towns' failure to amend their applications would create some tangible benefit to the City of Hartford. The *failure* of the towns to amend would deny Hartford the one thing its prayer for relief sought: to compel the towns to take HUD money and use it as Hartford chose. There could be no clearer indication that this was Hartford's goal and purpose than that it eschewed seeking the relief one would naturally have expected: a court order rescinding HUD's approval, declaring the town's funds forfeit, and ordering reallocation of those funds among applicants. That Hartford belatedly indicates a willingness, if all else fails, to consider applying for these funds if they become available is, in light of its purpose and prayer for relief, hardly the stuff that standing is made of.

Also, as mentioned above, Hartford would be competing with many other towns (see "Standard Metropolitan Statistical Areas", Rev. Ed. 1975, Ex. Office of President, OMB) in the SMSA for those reallocable funds—even assuming that its failure to apply by September of 1975 as other towns had did not bar its application for these first year funds—and would be limited in the uses to which it could put those funds to "urgent needs" as defined in HUD regulations. There was no claim in the complaint or evidence at trial that Hartford had any such "urgent needs". Indeed, as noted above, Hartford's belated June, 1976 "feeler" for funds and HUD's indication of disapproval, is ample demonstration that no such needs exist.

As again succinctly summarized by the Court of Appeals (Appendix to Petition, A9):

> Much has been made in this case of the fact that if the defendant communities fail, or refuse to comply with the Act, their grants will be reallocated. This, it is claimed, will lead to the possibility that the plaintiffs would benefit from the reallocation of funds. This theory also is inadequate to support standing in the instant case. The relief sought and obtained by the plaintiffs left the defendants two choices: they could revise their figures and receive their grants, or they could refuse to comply and forfeit their grants. Inasmuch as the first alternative would produce no benefit for plaintiffs, it is immaterial whether they might benefit from the second—at least absent a "substantial probability" that the second alternative will in fact be chosen. *Warth* v. *Seldin, supra,* 422 U.S. at 504. Here, there was not the slightest showing that any of the defendant towns would choose to forfeit their grants rather than modify their applications.[a]

And see footnote 3.

D. No Evidence To Support Standing

Thus, the record in this case is devoid of a scintilla of evidence to support the theory that the City of Hartford suffered any personal injury resulting in any concrete, demonstrable way from HUD's or the towns' alleged statutory infractions. Such problems as Hartford may have, in common with many other American cities, long antedated the applications of these towns, or even the passage of the Act. There is no evidence that but for the towns' failure to include a different "expected to reside" figure, Hartford's lot would be any different. There is no evidence that the court's intervention would personally benefit Hartford in any tangible way. And clearly, of course, Hartford cannot sue as *parens patriae.* See, e.g.,

Com. of Pa., by Shapp v. *Kleppe,* 533 F. 2d 668 (D.C. Cir.; 1976), cert. den., 45 U.S.L.W. 3396 (Nov. 30, 1976); and *California* v. *Auto Manufacturers Association, Inc. (In Re Multidistrict Vehicle Air Pollution M. D.L. No. 31),* 481 F. 2d 122, 131 (CA-9; 1973), cert. den. 414 U.S. 1045 (1973).

Thus, in this case that went to a full trial on the merits, plaintiffs have completely failed to satisfy their burden of proving Hartford has standing.

E. The Individual Plaintiffs

In light of the foregoing, the discussion of the standing of Mrs. Jordan and Mrs. Mauldin may be much briefer. For clearly, the suggestion that these individual Hartford residents might derive "tangible benefits" from reallocation of funds to Hartford is infected with the same infirmity as the suggestion that Hartford could gain standing in that way. We have demonstrated above that factually, legally and logically the notion is chimerical and will not withstand scrutiny.

As for other grounds of standing, there are none. These two women do not work in the three defendant towns and do not claim they do or ever will. They would thus not be among those includible in the "expected to reside" category of any of these towns' applications. If the applications were amended, it would have no effect on these plaintiffs, for they would neither be working nor living in the towns where the community development projects would be built. If the applications are not amended and the towns proceed under their original plans, it will equally have no effect on these plaintiffs, who will not be working or living there. Indeed, while it has almost automatically been stated that these plaintiffs live in substandard housing in Hartford, the record is barren of any claim or evidence as to the quality of plaintiffs' present housing. Plaintiff Jordan had been living in Hartford since well before enactment of the Act. Plaintiff Mauldin moved to Hartford a month before

the Meeker Memorandum was issued permitting the towns to do what they did, and she moved to Hartford for family reasons totally unconnected with the Act or the defendants. These plaintiffs do not even allege that they would like to live in or work in or visit the defendant towns—even if such desires were relevant under the Act, which they are not.

Thus, their position is no different from that of appellants in *Evans* v. *Lynn* (at 590):

> [They] do not reside in the Town. They make no claim that they have ever sought or been refused housing in the Town. They have no interest in any Town property, or connection with any past or proposed housing project in the Town. They do not allege that either of the challenged projects will discriminate against them. They make no claim that the federal funds were diverted from any actual or proposed housing project that could have been of benefit to them. In short, they allege no specific, personal, adverse results whatsoever from the grants for sewer and park construction.

The Act, properly understood, eliminates any standing of the individual plaintiffs Jordan and Mauldin. Neither are they in the zone of interests protected by the Act nor can they allege any injury in fact. The Court's intervention will confer on them no tangible personal benefit. They have no standing.

F. Who Would Have Standing?

Having demonstrated that the law and the record in this case afford no support for the standing of *these* plaintiffs on *these* facts in *this* case under *this* Act, respondents have done what they are required to do, and can close. They are not content to do so, however; for they wish to ensure that this Court does not misconstrue their argument as meaning

no one has any standing to challenge what petitioners say was done here. Proper parties, they submit, would have standing; and at oral argument below they hypothecated just such parties. In response to a question from Judge Meskill as to who *would* have standing here, counsel for appellants responded, in substance: any "lower income person" residing in the town, or one who lived outside the town but worked in the town or was going to be working in the town. These sorts of people, counsel stated, clearly are those "residing in or expected to reside in" the town who would be affected, who arguably would suffer direct, personal injury from any statutory infractions, who would or could receive tangible personal benefits from court intervention.

On January 11, 1977, this Court, in its most recent standing opinion, found just such a person to possess the requisite standing. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 45 U.S.L.W. 4073, a case involving, *inter alia,* racial discrimination, petitioners challenged the standing of the individual plaintiffs. One of them was a man named Ransom. In finding Ransom did have standing, the Court stated as follows:

> Respondent Ransom, a Negro, works at the Honeywell factory in Arlington Heights and lives approximately 20 miles away in Evanston in a 5-room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build in Arlington Heights. Ransom testified at trial that if Lincoln Green were built he would probably move there, since it is closer to his job.
>
> The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a

> "substantial probability" *Warth* v. *Seldin,* 422 U.S., at 504, tha' the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights. His is not a generalized grievance. Instead, as we suggested in *Warth, id.,* at 507, 508 n. 18, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See *id.,* at 505; *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. at 41-42. Unlike the individual plaintiffs in *Warth,* Ransom had adequately averred an "actionable causal relationship" between Arlington Heights' zoning practices and his asserted injury. *Warth* v. *Seldin,* 422 U.S., at 507. We therefore proceed to the merits.
>
> *Id.,* at 4077

(In the preceding paragraph, the court also reiterated that "In the ordinary case, a party is denied standing to assert the rights of third persons." *Id.,* at 4076).

We have no Ransom in the case at bar. If we did, he would have standing. What we have are two Hartford residents who claim no connection whatsoever with the three defendant towns whose applications they seek to affect. They do not and will not work there. They do not and will not live there. What is done there can and will have no effect upon them. They have no standing.

Conclusion

Petitioners' theory of standing upon further examination boils down to the simplistic proposition that because someone must have standing, these petitioners have standing. Logic and the law refute that argument. Contrary, too, to what petitioners claim, the Second Circuit has erected no standing test of a "conclusive showing" or a "near certainty". All the Second Circuit has done—and all this Court has done—is to require that before a person

may invoke the machinery of the courts to hear his complaint he must show at least that the injury he alleges is "fairly traceable" to defendants' acts or omissions, that there is a "substantial probability" that absent those acts or omissions plaintiff would not have suffered this particular injury, and that the relief plaintiff requests, if granted, will redress that injury. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073, 4076 (1977). There may well be persons who can show these things in this case. All the Court of Appeals has found is that these particular plaintiffs cannot and—more importantly—after a full hearing on the merits, *did not*.

Petitioners note that HUD has already amended its regulations in a variety of respects. Thus, the regulations considered by the trial court in significant part have been superseded. The Meeker Memorandum that gave rise to this suit has long since, by its own terms, been interred, and there is no reason to believe that it will be resurrected. The lack of methodology to compute the expected to reside figures has in large part been cured by the passage of time and the consequent experience with this novel concept. Almost all the funds in this case have already been disbursed and spent. The decision below is in harmony, not in conflict, with all other decisions on standing and does not pretend to go beyond that limited issue to decide the meaning of the operative terms of the Housing and Community Development Act of 1974. It leaves the door to that task open to persons with proper standing.

Thus, the preconditions set forth in this Court's Rule 19(b) simply do not exist in the case at bar. The decision below is as one with the decisions of this Court that form its firm foundation.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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